Waterway and Wetland Handbook
CHAPTER 10
GENERAL

GUIDANCE PURPOSE AND DISCLAIMER

This document is intended solely as guidance, and does not contain any mandatory requirements except where requirements found in statute or administrative rule apply. This guidance does not establish or affect legal rights or obligations, and is not finally determinative of any of the issues addressed. This guidance cannot be relied upon and does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decision made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes, common law and administrative rules to the relevant facts.

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A. Statement of Purpose and Need

1. Introduction to Water Regulation Authorities

Most of the statutory requirements for the Water Regulation Program are contained in Chapters 30 and 31, Wisconsin Statutes. These chapters are a noncomprehensive set of instructions guiding the use and protection of the public interest in Wisconsin's surface waters. Other important instructions are contained in Chapters 59, 87, 88 and 144, Wisconsin Statutes.

Chapters 30 and 31 represent well over 200 years of evolution of the trust doctrine, uses of the trust available to individuals, corporations and municipalities and reasonable protection of the trust by the state (now DNR) as trustee on behalf of the public.

The evolution has been shaped by legislative action and court review of basic ordinances and constitutions. Our everyday interpretation of present statutory instructions reflects the interplay between the legislative process and the judicial process. We operate in the tension zone between the legislature's perception of public opinion and the Supreme Court's definition of public interest in Wisconsin's surface waters.

Court decisions have been remarkably consistent in urging vigorous protection of the trust. A comparison between the definition of trust in the Muench and DeGaynor decisions shows the increasing specificity.

Chapters 30 and 31 utilize "loose" construction, relying on the administrative agency to apply the statute to each fact situation. William Torkelson, former Chief Counsel for the Public Service Commission, quoted a Supreme Court statement to suggest what he believed was required to make the system work, "we must remember that the machinery of government would not work if it were not allowed a little play in its joints."

Administrative rules are used to detail statutory meaning. They clarify for the public and the judiciary how the agency administers the law. They cannot create law beyond the authority provided in the statutes. They do have the effect of law. Presently there is a great debate regarding the need for administrative rules. The water regulation program functioned for 60 years without any administrative rules. That experience is significant in several ways. It was consistent with the tradition of generally worded statutes and allowed staff to fit the statutes to each fact situation encountered. It was also possible because until recently the program was administered by relatively few people located in one office in Madison.

Now we are confronted with both a clamor for additional rules to more precisely describe the laws we administer at the same time that we are confronted with a great public resistance to more rules. No doubt additional administrative rules will be adopted in the future for the water regulation program. Regardless of the number of rules that are adopted, there will still be a great need for the exercise of reasonable judgment by all of the staff involved in the administration of the water regulation program.

2. Wisconsin's Public Trust

Wisconsin is a state of magnificent variations. Several distinct physiographic provinces results in a distinguishable set of natural features including topography, geology, soils, vegetation and animal diversity which justify differences in decisions resulting from the application of the same Statute in different physiographic provinces.

Of a lesser, but still significant nature, is the climatic variation that exists in Wisconsin. Duration of seasons, such as winter length in the north vs. the southeast, variation in precipitation amounts, local seasonal influences such as occur near the Great Lakes, all influence decisions made in this program.

Population distribution and economic activity are similarly highly variable in Wisconsin. We are confronted with contrast in population density ranging from metropolitan to truly wilderness conditions. The economic activities which occur in Wisconsin span the gamut of opportunity. These factors also influence decisions made in this program.

The statutes which we administer have been adopted over the years since the mid-1800's. They reflect the varying style of statutory language that has been used during the period. Consequently, we are obliged to relate to a widely varied system of procedure, public notification, hearing and statutory standards as we administer this program.

The water regulation program is probably the most decentralized program in the department. This means that program staff working in the field are required to exercise individual judgment daily. This situation gives rise to the opportunity for divergent judgment decisions and potential nonuniformity in program application. Constant vigil must be exercised to minimize this potential.

Water regulation's complexity and decentralization imposes a great need for judgment on those people involved in the day-to-day administration of the program. To the fullest extent possible we must strive to apply these statutory instructions and guidelines in as uniform and consistent a manner as practicable given the complexity of our mission.

3. Training for Water Regulation Personnel

Training, audits, standard forms, policy and procedure statements (manual codes), administrative

rules, program review and consultation between field and section staff are among the tools used to achieve uniform and consistent regulation.

Training materials are an important and commonly used component. The procedural and technical training information must be used in a flexible manner. The need for flexibility arises from the variations which we encounter in administration of this program throughout Wisconsin. The training materials are not standards. Standards must be adopted either in statutes or in administrative rules.

Training is a major factor in achieving the goal of uniform and consistent application of the water regulation program. Training will take many forms, both formal and informal. We all need to be alert to items which we encounter which are of a program-wide nature and which should be channeled from the discoverer to the bureau for later dissemination throughout the program. Training topics will include technical information, new legislation, new court decisions and new or changed intergovernmental relationships which bear on the administration of the water regulation program.

B. Development of the Water Regulation Program

The rules of law pertaining to navigable water in Wisconsin go back to the early history of our country.

When the thirteen American colonies declared their independence, they became independent sovereign states. As such, they owned the waters and their beds within their respective boundaries and could make whatever rules they desired concerning the waters and their beds subject to common law and general usage.

l. Northwest Ordinance of 1787

The cession of Virginia's Northwest Territory to the United States Government in 1781 and the conditions imposed by Virginia were incorporated in the ordinance of 1787.

The Ordinance of 1787 was adopted July 13, 1787, nearly a year and eight months before the United States Constitution was adopted.

Article IV of the ordinance provides in part:

> ...The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be <u>common highways and forever free,</u> as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor...

Article V of the Ordinance provides that a state formed in said territory

> ...shall be admitted by its delegates, into the Congress of the United States, on an equal footing with the original states in all respects whatever, and shall be at liberty to form a permanent constitution and state government...

2. Wisconsin Constitution

Wisconsin was admitted as a territory on April 20, 1836. The first paragraph of the Wisconsin Enabling Act provides as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in

> Congress assembled, that the people of the Territory of Wisconsin be, and they are hereby, authorized to form a constitution and state government, for the purpose of being admitted into the Union on an equal footing with the original States in all respects whatsoever, by the name of the State of Wisconsin.

Section 3 of the Enabling Act provides:

> And be it further enacted, That the said State of Wisconsin shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said State of Wisconsin, so far as the same shall form a common boundary to said State and any other State or States now or hereafter to be formed or bounded by the same; (and said river and waters, and the navigable waters leading into the same, shall be common highways and forever free, as well to the inhabitants of said State as to all other citizens of the United States without any tax, duty, impost or toll, therefor.) (Parenthesis added)

In the act admitting the State of Wisconsin into the Union, the provision that the navigable waters would be public highways was omitted. However, the Constitution of the State, adopted by the Territorial Convention on February 17, 1848 and approved by the act admitting Wisconsin into the Union, contains the following provisions:

> …and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highway and forever free, as well to the inhabitants of the State as to the citizens of the United States, without any tax, impost or duty therefor. (Article IX, Section 1.)

Such parts of the common law as are now in force in the territory of Wisconsin not inconsistent with this Constitution shall be and continue to be part of the law of this state until altered or suspended by the Legislature (Article XIV, Section 13).

3. Legislative Language

As Wisconsin grew, the need for legislative action to authorize development of the surface waters increased significantly. In 1853 the legislature adopted Chapter 72, Laws of 1853, approved April 5, 1853. This law declares that the common law of England, in so far as it may be applicable under Wisconsin conditions, shall be the law of Wisconsin in determining the boundaries of lands adjoining waters and the several respective rights of individuals, the state, and its citizens in respect to all lands or waters.

Territorial and early state legislative action generally authorized use or exploitation of the state's waters. Examples of that legislation include the Green Bay-Mississippi Canal Company and other canal companies which were chartered during territorial times and early statehood. The Mill Dam Act was an effort to support the farming and logging industry in the State by making use of the state's waters available to individuals or corporations involved in those industries. Log driving dam companies and boom companies were also authorized by legislative charter. All of this legislative action reflects the need for a positive action by the trustee to authorize individual or corporate use of the public trust compatible with protecting the public trust.

Inherent in all of these actions was the need to serve the public interest. For example, it was in the public interest to build mill dams for the grinding of grain and sawing of logs. Granting portions of the public lakebed is another interesting example of the need for an expression of the public interest. Early efforts by the legislature to grant portions of the lakebed were held unconstitutional because they served a narrow collection of private interests. By successive

rewording of attempted grants, the language of the grants eventually incorporated sufficient public interest to be judged constitutional.

4. Court Decisions

Supreme Court decisions have played a major role in the evolution of the water regulation program. They are of statewide impact and, therefore, must be incorporated into the administration of the program. There are several hundred decisions of significance to the water regulation program.

Circuit court decisions are generally of significance only to the particular case. A few are significant enough to be related in the training material.

Appeals court cases are generally of statewide significance.

A matrix (Appendix 1) relates each court case to appropriate subsections of Chapters 30 and 31. An annotated bibliography (Appendix 2) lists the significant points made in each court case.

5. Attorney General's Opinions

The Attorney General (AG) is the chief state legal officer. He is required to resolve legal disputes of an informal nature between agencies. He responds to requests for legal advice and assistance from county district attorneys. His decisions are binding on state agencies. Many Attorney General's opinions have helped shape the water regulation program. Pertinent AG opinions are discussed in separate sections.

6. Administrative Interpretations

Administrative interpretations include Bureau of Legal Services' opinions and agency administrative rules. The matrix of administrative rules was described earlier in this chapter.

Bureau of Legal Services opinions are only binding on this agency and not on other state agencies, persons, corporations or municipalities.

Rules and opinions that have shaped water regulation are discussed in the appropriate sections.

C. Fundamental Concepts in Water Regulation

1. Trust Doctrine

In Wisconsin the waters of the state are said to be held in trust by the state for the public. This principle, known as the "trust doctrine" has been followed from the beginning in the formation of water rights in Wisconsin. It is a reflection of the Northwest Ordinance and our constitution.

The origin of the trust is the common law of England, as understood and adopted by the Wisconsin Supreme Court. In its enabling legislation Wisconsin followed the main principles of the doctrine but modified it to the extent that while the state keeps custody of all waters for the public, it only has true ownership of the beds of natural navigable lakes. Beds of navigable stream are owned by the stream riparian. This ownership is qualified since the state retains custody of the water which flows over the bed.

This custodianship (trust) cannot be surrended or alienated. It can be delegated for a public

purpose or use which is for the public benefit provided the state retains ultimate control. This custodianship also gives the state the authority to make rules and regulations governing these waters. The power of the state to govern and control public waters is perpetual. All privileges or uses granted in public waters are subject to this power of the state. The trust doctrine thus governs all the laws which regulate surface waters in Wisconsin subject to the overriding national interest.

2. Navigability

The definition of navigability used in the State of Wisconsin has been remarkably consistent over time. There has, however, been substantial variation in administrative practice. This variation has led to many situations where we have in effect changed our mind or have been forced to change our mind by court decisions. The most recent definition comes from the DeGaynor Supreme Court case. It represents the evolution of a definition process dating back to the adoption of the English riparian doctrine as Wisconsin's basic water law by the legislature in 1853. Navigability and the determination of navigability are discussed in detail in Chapter 155 of these materials.

Informal opinions such as a verbal opinion or letter or memo will usually be sufficient for most inquiries we receive as a prelude to an application or enforcement action. Declaratory rulings pursuant to Chapter 227, Stats., or court decisions formally determine navigability.

3. Ordinary High-Water Mark

The ordinary high-water mark (OHWM) of a waterway is of special significance because it is the boundary that separates private and public rights. In addition, the major permitting authority of the department begins at that boundary.

The presently accepted definition of the OHWM is found in the 1914 Supreme Court decision in the case Diana Shooting Club v. Husting (case 146 in Appendix 1).

"By ordinary high-water mark is meant the point on the bank or shore up to which the present and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic..."

The OHWM is discussed in detail in Chapter 40 of these materials.

D. Tools used in Water Regulation

1. Benchmarks

Benchmarks are points of known elevation and position. They are set for use in regulating water levels or in keeping a history of lake elevations and stream flow. Benchmarks are important aids in administering many sections of the water laws. They are used in the process of granting or denying permits for dam and bridge construction, for diverting water for irrigation and as a permanent reference for relating violation surveys. Ordinary high-water marks can be referenced to benchmarks. The procedure for setting and using benchmarks is given in appendix 3 of these materials.

2. Monitoring

Lake levels should be taken on approximately 30 percent of the lakes per year per district, both in

the spring and fall. Benchmarks should be checked and/or replaced or secondary marks set as necessary. Mean sea level elevation level lines should be run to our benchmarks that are close to USGS or USCGS benchmarks. It is important that a percentage of the lakes have levels taken every year so a good history can be kept for future permit or enforcement activities.

F. Filing Guidebook.

Directions for filing procedures in the water management program are found in Appendix I of Part VII of the DNR Filing System Guidebook.

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

Date: May 14, 1984 *File Ref:* 3500

To: Water Regulation Section
Water Management Coordinators
Water Management Specialists

From: Scott Hausmann - WRZ/5

Subject: Water Regulation Topical References

Attached is a copy of a reference table that John Coke developed last fall as he attempted to learn the program. I am much impressed by his effort and have found the table to be extremely useful.

This is the first crack at a final (?) draft, so if you have any comments, corrections, additions, atta-persons, ah-sh ts, etc., please send them directly to John.

If you need additional copies, please contact Elly Lawry.

SH:el
Attach.

[Attachment not scanned]

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: July 18, 1984 FILE CODE: 3500

TO: District Directors PMMS Response
Water Regulation Handbook

FROM: Paul Scott Hausmann - WRZ/5 Chapter 10

SUBJECT: Referred File Criteria, Contested Case Hearings

The purpose of this guidance is ultimately to en sure that all files referred to the Bureau for a contested case hearing are complete and accurate. But most important is that everyone knows what is required in **a** referred file to expedite its scheduling and to aid the judge or hearing examiner in his/her decision.

Files referred to the Bureau should contain the following information:

1. A copy of a complete application and plans. (Originals are preferable. Remember the hearing examiner/judge will be reviewing this information.) Plans must include pertinent information identifying bench marks, elevations,dimensions, etc.

2. Photographs (3" x 5") are extremely helpful in understanding various issues that may lead to the approval/denial of a permit application. All photographs should be properly identified (who, what, where, **when.,** etc.).

3. A completed 3500 - 23 inspection form should accurately and adequately describe the proposed project, anticipated impacts and evaluation of the project. Remember this form is the document which provides the foundation for the Department's position regarding approval/denial of an application.

4. Copy of an approved environmental assessment (if required or warranted) with all exhibits properly identified and attached to the document. Although some referred files are considered Type III actions under NR 150, that does not preclude us from preparing an assessment if one is warranted. EA's are not intended for use as a decision making document, but they are extremely helpful in providing an objective analysis of the impacts that may result from a given activity.

5. Clear copies (or siginals preferred) of any additional information such as DNR/Applicant correspondence, scientific/engineering reports, objection/support letters and previous correspondence or actions (historical) that may have some bearing on the project. An outline describing what permits are required (local, state and federal) and what people in these regulatory processes (SEWRPC, FWS, Corps, Zoning Department, etc.) you have conferred with and if those people can provide information for the hearing and/or any other pertinent information.

6. An indication that the file has been reviewed to ensure completeness and compliance with all <u>statutory</u> and <u>administrative</u> code requirements (emphasis added).

7. Cover memo from the district office indicating district recommendations, preferred hearing dates, and witnesses that should testify.

A handy guide for reviewing a file before referring it is: does the file contain enough information in it that someone, who if familiar with the program (but not the specific case), can sit down and write a legally defensible approval/denial order based on the file. Remember, the examiner/judge is ultimately going to

have to do exactly that and we are obligated to present a good basis for that decision.

As you know, it takes a long time to get a file scheduled for hearing. Hopefully a little more effort on our part may help expedite the process.

Reviewed by:
Byron Dale Simon
John Coke
Richard Vogt
Robert Sonntag
Michael Cain

cc: Robert Roden - WRZ/5
James Kurtz - LEG/5
Art Doll - M&B/5

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CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: January 5, 1987 3550

TO: District Directors

PMMS Response
Insertion: Chapter 10, Water Regulation Handbook,
Chapter 15, Floodplain-Shoreland Management Guidebook

FROM: Robert W. Roden - WZ/6

Distribution:
All Water Management and Floodplain Staff

SUBJECT: Notice of Appeal Rights

Here are revisions of the Notice of Appeal Rights for the Water Regulation and Zoning program decisions. These revisions are taken from the complete set of Notice of Appeal Rights recently issued (November 13, 1986) by the Bureau of Legal Services.

The appeal period begins on the date the decision was mailed or otherwise served (e.g., hand delivered). Therefore the appeal rights notification in the decision must inform the recipient of the date of mailing or service. The following are options you can choose from to do this. The language should be inserted at the end of the notification of appeal rights on the decision (do not put into a cover or transmittal letter).

1. Option 1: "This decision was (mailed)(served) on the day it was signed."

   Discussion: This can be preprinted and only requires indicating whether the decision was mailed or served by another means. If one technique (e.g., mailing) is always used for a type of decision, you don't need the "(served)" option. You can use this method if you know when mailing will occur and the signature on the decision is dated accordingly. This option must be used for all "Form 3" notifications.

2. Option 2: "This decision was (mailed)(served) on _____ :
   (date)
   Discussion: This can be preprinted. The date can be handwritten, typed, or stamped into the blank. The signature date can be made the same or the two can be different.

3. Option 3: Use a stamp which says "MAILED" and has a variable setting for the date.

4. Option 4: "This decision was mailed within _____ days of the day it was signed and any appeal of it must be served on the Department within _____ days after the decision was signed."

   Discussion: This is an awkward approach but you may wish to use it if you don't know when mailing will occur but do know how long the delay could be. The number of days can be handwritten, typed or stamped into the blanks (obviously the second number is 30 more than the first).

   Now for the revised notifications and the types of decisions for which they should be used:

Form 1 Notice of Appeal Rights

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., as renumbered by 1985 Wisconsin Act 182, you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

To request a contested case hearing pursuant to section 227.42, Stats., as renumbered by 1985 Wisconsin Act 182, you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources. The filing of a request for a contested case hearing is not a prerequisite for judicial review and does not extend the 30-day period for filing a petition for judicial review.

This notice is provided pursuant to section 227.48(2), Stats., as renumbered by 1985 Wisconsin Act 182.

Use Form 1 for:

s. 30.10(2) approval of private bridges over streams under 35 feet in width
s. 30.11 bulkhead line approval or denial order
s. 30.12(2) structure permit
s. 30.12(3) riprap, sand blanket, fish crib, or ford permit or denial
s. 30.121 certification of repair cost for boathouses
s. 30.126(8)(c) order to remove noncomplying Wolf River fishing raft
s. 30.13 pierhead line approval or denial order
s. 30.15(2) consent to placement of temporary booms
s. 30.18(2)(a) or (b) diversion permit
s. 30.19 enlargement of waterway permit
s. 30.195 channel change permit or denial
s. 30.196 enclosure of waterways
s. 30.20 dredging permit
s. 31.02(l) levels and flow order
s. 31.02(2) and (4) order regarding construction, operation, maintenance, or equipment for a dam
s. 31.05/31.06 permit to construct, operate, and maintain a dam
s. 31.07/31.08 permit to operate and maintain an existing dam
s. 31.12(l) and (2) approval of plans for dams
s. 31.13 permit to raise, enlarge, or rebuild a dam
s. 31.18(l) approval to remove or destroy certain equipment
s. 31.18(3) order approving or denying "substantial alteration or addition" to adam
s. 31.185 permit to abandon or transfer ownership of a dam
s. 31.21 approval to transfer a permit for a dam
s. 31.23 permit to construct a private bridge
s. NR 115.05(2)(a)7 and NR 117.05(1)(a)7 decision adopting final wetland inventory maps for regulatory purposes and published notices of such adoption
s. NR 115.06(2) issuance or denial of approval for a shoreland zoning ordinance
s. NR 116.07(1) approval of a hydrologic or hydraulic study
s. NR 116.21(6)(e) issuance or denial of approval for floodplain zoning ordinance amendments
s. NR 116.22(2) issuance or denial of approval for a floodplain zoning ordinance

s. NR 117.06(2)(a) issuance or denial of approval for a shoreland wetland zoning ordinance
s. NR 118.07(1)(b) issuance or denial of approval for a Lower St. Croix Scenic Riverway ordinance
s. NR 118.07(2) objection by DNR to a "conditionally permitted" activity
s. NR 299 water quality certification waiver, grant or denial

Form 2 Notice of Appeal Rights

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., as renumbered by 1985 Wisconsin Act 182, you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

This notice is provided pursuant to section 227.48(2), Stats., as renumbered by 1985 Wisconsin Act 182.

Use Form 2 for:

s. 30.20 dredging contract or denial of contract

Form 3 Notice of Appeal Rights

NOTICE OF APPEAL RIGHTS

Any person whose legal rights and privileges are interfered with or impaired, or are threatened with interference or impairment, by the ordinance which is adopted herein may seek judicial review of the validity of the ordinance in an action for declaratory judgment, in accordance with the provisions in section 227.40, Stats., as renumbered by 1985 Wisconsin Act 182. The Department of Natural Resources must be named as the party defendant in such an action. This notice is provided pursuant to section 227.48(2), Stats., as renumbered by 1985 Wisconsin Act 182.

Use Form 3 for:

s. 30.126(7)(b) order adopting uniform Wolf River fishing raft registration system for a noncomplying municipality
s. 30.27(3) order adopting a Lower St. Croix Scenic Riverway ordinance for a noncomplying municipality
s. 59.971(6) order adopting shoreland zoning ordinance for noncomplying county
s. 59.971(7) order declaring city or village ordinance invalid
s. 61.351 and 62.231 order adopting shoreland-wetland zoning ordinance for noncomplying village or city
s. 87.30(l)(b) order fixing floodplain limits or adopting floodplain zoning ordinance for noncomplying municipality

Reviewed by:
Scott Hausmann
Mike Cain
Larry Larson

Tom Steidl
Linda Wymore

SH:cb
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CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: April 8, 1987 FILE CODE: 3500

TO: District Directors

PMMS Response
Insertion: Ch. 10, Water Regulation Handbook

Distribution: All program staff

FROM: Robert W. Roden

SUBJECT: Permit Applications Involving Multiple Ownerships of Riparian Property

Several statutes require riparian status for a person to apply for and receive permits under Ch. 30 (e.g., ss. 30.12, 30.18 and 30-195). Questions have arisen over what should be done if the riparian property is owned by more than one person (this would also include marital property).

Where the property is owned by more than one individual, all of the individuals who own that property must be co-applicants for the permit or approval. If these owners are represented by an agent, board of directors, or officers of an organization or corporation, the duly authorized individuals must sign the application. In these situations, we need a valid statement from all of the owners such by-laws of the organization, shareholder resolution, power of attorney, etc., allowing the authorized representatives to act on behalf of all of the owners. If an applicant does not meet these requirements, we do not have jurisdiction to proceed and the application must be dismissed.

In the case of an applicant who is married, there is a presumption under the new Wisconsin Marital Property Act that all property of spouses is marital property subject to joint control. Although there are provisions in the Marital Property Act which allow an individual spouse to manage and control property under certain circumstances, such management actions are subject to review by the other spouse to assure that the action was taken in "good faith." Therefore, we should request the signature of the spouse of any applicant who is married.

An information sheet that you can attach to the general application form, or to a specific application form, is attached. This form recognizes the existing law on riparian ownership (after Cassidy, et al v. Department of Natural Resources).

Reviewed by:
Scott Hausmann
Michael Cain

RWR:sm/5868I
cc: Jim Kurtz LC/5
Mike Cain LC/5

NOTE: If this application is for a permit under ss. 30.12, 30.18, or 30.195, Wis. Stats., the owner of the riparian (shoreline) property involved must sign this application. If the property is owned by more than one person, all owners must sign. If the property is marital property, the spouse(s) of the owner(s) must sign. If there is a duly authorized agent or representative with specific authority from the owner(s) to apply for this permit, the agent or representative may sign this application on behalf of the owner(s). The agent or representative may be asked to provide written documentation of his or her authority to act on behalf of the owner(s).9262H

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: May 4, 1987 FILE CODE: 3500

TO: District Directors

PMMS Response
Insertion: Ch.10, Water Regulation Handbook

Distribution: All program staff

FROM: George Meyer

SUBJECT: Department objections to proposals under Chs. 30 and 31 which require public notice and Department appeals of Hearing Examiner decisions

Objections

As you know, various provisions of Chs. 30 and 31, Statutes, require a Class I legal notice before the Department can grant a permit. The Department also has the authority in a number of other situations to issue a Class I legal notice on its own initiative.

When a Class I notice is issued, any objection received from the public is not valid unless it was made within 30 days of the date the notice was published in the appropriate newspaper. That same time limit should apply to objections raised by the Department, even though this is not legally required. I believe this is the proper approach because we should know our position before a notice is sent (see discussion below) and because we should be able to make these judgments within the same time constraints imposed on the public. The only exception to this that I consider justified is if we base our objection on significant new information, received from the public or otherwise discovered by the Department during the 30-day notice period, that we were not previously aware of. This exception should only be used in very limited circumstances where the information could not have been previously discovered by due diligence on our part.

The preferred procedure is not to issue public notices until we have determined whether or not we have objections to the project. Obviously, if we object, we can advise the applicant that he or she has the option of withdrawing the application or proceeding directly to a public hearing. That way the applicant only pays for the publication of one legal notice. I understand that there will be times when you will deem it necessary to issue the public notice anyway to speed up processing time or to determine whether or not a project is highly controversial. However, you should be prepared to object within the 30-day period or to grant the permit if no timely objections are made by others, unless the exception noted above applies.

Appeals

There are several procedures that can be used to reopen or appeal Chapter 30 or 31 decisions by Hearing Examiners following contested case hearings. For a Department-initiated appeal or similar action, the request must be made by the Administrator, Division of Enforcement.

1. Reopening hearing: The Department (Secretary) or the Hearing Examiner can issue an order reopening a hearing which was closed if there is substantial new evidence which is important to the case. Procedures are in NR 2.16, Wis. Adm. Code.

2. Rehearing: A petition for rehearing may be filed by any "party of record" within 20 days after a final decision is issued. Criteria and procedures for granting a rehearing are contained in s. 227.49, Stats. The Department

(Secretary) is empowered to grant or deny the petition.

3. Review by the Secretary's office: A request can be made that the Secretary or his designee review the record and be the final agency decision-maker in lieu of the Examiner. The procedure is spelled out in NR 2.20, Wis. Adm. Code.

4. Judicial review: If the Examiner's decision is treated as a final agency decision and the decision is subject to judicial review (true for any ch. 30 or 31 proceeding), the Department (Secretary) may petition for judicial review. This procedure is specified in s. 227.46(8), Stats.

The criteria for reopening hearings are fairly clear. Requests will be sent to the Administrator, Division of Enforcement. The times when we will pursue any of the other remedies will be limited to situations where we believe the Examiner's decision not to be well-reasoned or where we feel there are major errors based on the law or on the facts of the case. In either situation, there should also be a significant concern about a critical natural resource or major adverse policy implications before an appeal is made. If we choose to appeal, the NR 2.20 procedure will normally be used instead of s. 227.46(8).

Questions regarding these procedures can be addressed to Bob Roden or Jim Kurtz.

RWR:dlm
cc: Bob Roden - WZ/6
Jim Kurtz - LC/5
Area Directors
Mike Cain - LC/5
Scott Hausmann - LC/5
5868I

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: May 6, 1987 FILE REF: 3500

TO: District Directors

PUT IN: Chapter 10, Water
Regulation Handbook

FROM: Scott Hausmann - WZ/6

DISTRIBUTION: All Program Staff

SUBJECT: Entering Excavations or Trenches

Last Spring the Department contracted with an industrial hygienist to perform a comprehensive job hazard identification. Safety plans are to be prepared for each of the job activities identified in that report. One activity identified for water regulation staff, and the subject of this guidance, is the entering of excavations or trenches. Entering excavations or trenches could be encountered by program staff at various contruction sites as a result of the need to determine or verify compliance with Chapter 30 and 31 permit conditions for various types of construction projects.

In all cases program staff should not enter an excavation or trench unless the walls or sides are properly shored, or the sides are sloped gradually to the base of the excavation. Even where the excavations are shored ladders should be available for rapid exit, should it become necessary. All ladders should be inspected for defects such as loose rungs, adequate attachment and properly pitched. Only one person should be on the ladder at a time.

In addition to the above general safety precautions, under certain circumstances a trench or excavation could be considered a confined space. Entry of confined spaces by public employees is covered by Chapter ILHR 31 Wis. Adm. Code. As defined by ILHR 31.01(2) a confined space is an environment which by design or construction has all four of the following characteristics:

1. Limited openings for entry and egress.

2. Unfavorable natural ventilation.

3. Could reasonably be believed to have dangerous air contaminants or contain material which may produce dangerous air contaminants.

4. Is not intended for human occupancy.

Prior to entering a confined space the inspecting staff must be trained in confined space entry procedures. This training should provide staff with the knowledge to recognize, understand and control air quality hazards that may be encountered in confined spaces. Staff must also receive training in multi-media first aid and cardio pulmonary resuscitation before entering a confined space. Each district has a designated confined space coordinator that can be contacted to assist you in determining if a particular trench or excavation should be considered a confined space. He should also be contacted to obtain any necessary air testing or safety equipment.

Extreme caution and common sense should be utilized prior to entering any trench or excavation and the first rule-of-thumb should always be "If in Doubt, Stay Out."

Reviewed By:

John Coke
Ken Johnson

JK:sm/9815H

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: September 28, 1987 FILE CODE: 3500

TO: District Directors

Insertion: Chapter 10 Water Regulation Handbook

Distribution: Program Staff

FROM: Scott Hausmann - WZ/6

SUBJECT: Preparation of Files for Hearings

Recently, the scheduling of files referred to the bureau for hearing has been delayed because of either missing or incomplete information. Also, in the past, we have allowed statutory or administrative standards to be addressed concurrently with scheduling and noticing of a hearing. This policy has not worked well and has occasionally forced staff to scramble to provide the information or rush to the site for a last minute inspection. This guidance in the form of activity specific checklists should serve to provide a list of information which should always be addressed completely prior to forwarding a file to the bureau. Hopefully, the use of these checklists will prevent scheduling delays and other problems.

In a July 18, 1984 program guidance, Paul Scott Hausmann listed a number of items which should be included in all hearing files. These items are repeated below:

1. A copy of a complete application and plans. (Originals are required to allow for adequate review. Remember the hearing examiner/judge will be reviewing this information.) Plans must include pertinent information identifying bench marks, elevations, dimensions, etc.

2. Photographs (3" x 5") are extremely helpful in understanding various issues that may lead to the approval/denial of a permit application. All photographs should be properly identified (who, what, where, when, etc.).

3. A comoleted 3500 - 23 inspection form should accurately and adequately describe the proposed project, anticipated impacts and evaluation of the project. Remember this form is the document which provides the foundation for the Department's position regarding approval/denial of an application. If an explanation is required for a specific item, please address the item completely.

4. Copy of an approved environmental assessment (if required or warranted) with all exhibits properly identified and attached to the document. EA's are not intended for use as a decision making document, but they are extremely helpful in providing an objective analysis of the impacts that may result from a given activity.

5. Clear copies (originals preferred) of any additional information such as DNR/Applicant correspondence, scientific/engineering reports, objection/support letters and previous correspondence or actions (historical) that may have some bearing on the project. An outline describing what permits are required (local, state and federal) and what people in these regulatory processes (SEWRPC, FWS, Corps, Zoning Department, etc.) you have conferred with and if those people can provide information for the hearing and/or any other pertinent information.

6. An indication that the file has been reviewed to ensure completeness and compliance with all statutory and <u>administrative</u> code requirements (emphasis added).

7. Cover memo from the district office indicating district recommendations, referred hearing dates, estimated length of hearing, and witnesses that should testify.

RWR:KGJ:jd/6400I

Check List for 30-10 Applications/Hearings (Approvals)

	Included or Addressed	Witness
1. Signed application	_____	_____
2. Navigability	_____	_____
3. Conforms to NR 320		
a) Clearance	_____	_____
b) Flood flow capacity	_____	_____
NR 116, Less than 0.01' BW or amendments/easements or contained on property or meets NR 320.06(2)(3) thru (d)	_____	_____
4. Scaled Plans	_____	_____
5. Copy of 3500-23	_____	_____
6. NR 15U type and compliance	_____	_____

Check List for 30.11 Bulkhead Line Approvals/Hearings

	Included or Addressed	Witness
1. Approved Ordinance	_____	
2. Technically adequate BHL and Map (6 copies)	_____	
a) Closes within accepted tolerances	_____	
b) Adequately documented with benchmarks	_____	
c) Adequately mapped	_____	
1) Scale at least 1" =100'	_____	
2) OHWM shown	_____	
3) BHL shown (Begins and ends at OHWM)	_____	
4) BM shown	_____	
5) Stamped by a registered surveyor	_____	
6) Referenced to section quarter corner	_____	
7) Existing shoreline shown	_____	
3. Conforms as nearly as practicable to the shoreline	_____	_____
4. In the public interest	_____	_____
5. Regularizes the shoreline	_____	_____
6. Existence of submerged leases (verified)	_____	_____
7. Conforms to NR 1.95	_____	_____
8. Conforms to NR 115	_____	_____
9. Conforms to NR 116	_____	_____
10. Conforms to NR 117	_____	_____
11. NR 150 type and compliance	_____	_____

Check List for 30-12 Applications/Hearings

	Included or Addressed	Witness
1. Riparian owner		
a) Application signed	_____	
b) Deed or property tax statement	_____	
c) Within riparian zone of interest	_____	_____
2. Navigability (if stream)	_____	_____
3. Standards		
a) "Structure does not materially obstruct navigation"	_____	_____
b) "Does not ... reduce effective flood flow..."	_____	_____
c) "Not detrimental to the public interest." (Scenic beauty, game habitat, adequacy, alternatives)	_____	_____
4. No BHLs in the project area	_____	_____
5. Conforms to NR 1.95	_____	_____
6. Conforms to NR 115	_____	_____
7. Conforms to NR 116	_____	_____
8. Conforms to NR 117	_____	_____
9. Conforms to NR 325	_____	_____
10. Conforms to NR 326		
a) If marina, open to public	_____	_____
b) Reasonable fee	_____	_____
c) Allows for passage of littoral drift (combination structures may be exempt)	_____	_____
11. Copy of public notice	_____	
12. Copy of 3500-23	_____	
13. NR 150 type and compliance	_____	
14. Conforms to NR 320	_____	_____
a) Clearance	_____	_____
b) NR 116, less than .01' BW	_____	_____
Amendments/Easements/Contained on Property		
15. Letter of objection	_____	_____
16. Conforms to NR 327	_____	_____

Check List for 30.121 Boathouses Certifications

	Included or Addressed	Witness
1. Conforms to NR 325		
a) Maintenance records	_____	_____
b) Assessed value	_____	_____
c) Repair estimates	_____	_____

Check List for 30.13, 30.14 Hearings

	Included or Addressed	Witness
1. Riparian Owner		
a) Deed or property tax statement	_____	
2. Navigability (if stream)	_____	_____
3. Aid of navigation or incidence	_____	_____
4. Does not interfere with public rights	_____	_____
5. Does not interfere with rights of other riparians		
a) Riparian rights line	_____	_____
6. Existence of pierhead lines (verified)	_____	_____
7. Free movement of water and will not cause formation of land	_____	_____
8. Compliance with municipal ordinances	_____	
9. No permit exists (verified)	_____	
10. Initial installation date	_____	
11. Plans (x-section and plan view)	_____	
12. Letter of objection	_____	

Check List for 30.18 Applications/Hearings

	Included or Addressed	Witness
1. Riparian		
a) Deed or property tax statement	_____	
b) Signed application	_____	
c) Attorney's opinion on chain of title test	_____	
2. Public rights are not injured	_____	_____
3. Surplus water determination	_____	_____
If diversion is more than surplus, consent	_____	
4. Plans (in duplicate)	_____	
5. Copy of the public notice	_____	
6. Trout stream determination (Publication 213-57)	_____	
7. Total diversion and times	_____	
8. NR 150 type and compliance	_____	
9. 3500-23	_____	_____
10. Conforms with NR 1.95	_____	_____
11. Conforms with NR 102	_____	_____
12. Conforms with NR 200	_____	_____
13. Letter of objection	_____	
14. Identification of downstream users and amounts	_____	_____

Check List for 30.19 Applications/Hearings

	Included or Addressed	Witness
1. Signed application	_____	
2. Project will not injure public rights	_____	_____
3. Project will not cause environmental pollution	_____	_____
4. Conforms to platting and sanitation laws	_____	_____
5. No "material" injury to riparians	_____	_____
6. Conforms with NR 340	_____	_____
7. Conforms with NR 180	_____	_____
8. Conforms with NR 116	_____	_____
9. Conforms with NR 115	_____	_____
10. Conforms with NR 117	_____	_____
11. Conforms with NR 1.95	_____	_____
12. 3500-23	_____	
13. NR 150 type and compliance	_____	
14. Copy of public notice	_____	
15. Letter of objection	_____	

Check List for 30.195 Applications/Hearings

	Included or Addressed	Witness
1. Signed application	_____	
a) Plans and x-sections	_____	
b) Navigability of stream	_____	_____
2. Project must improve economic or aesthetic value of the owners land	_____	_____
3. Project does not adversely affect flood flow capacity.	_____	_____
a) NR 116 - less than 0.01 BW or easements/ amendments/or on property	_____	_____
4. Project not detrimental to public rights or other riparians (or has consent)	_____	_____
5. Conforms with NR 1.95	_____	_____
6. Conforms with NR 115	_____	_____
7. Conforms with NR 117	_____	_____
8. Conforms with NR 340	_____	_____
9. 3500-23	_____	
10. NR 150 type and compliance	_____	
11. Letter of objection if hearing under 227	_____	

Check List for 30.20 Applications/Hearings

	Included or Addressed	Witness
1. Signed application	_____	
Plans and x-sections	_____	
2. Consistent with public interest/rights	_____	_____
Contracts less than 5 years	_____	
3. Conforms with NR 1.95	_____	_____
4. Conforms with NR 115	_____	_____
5. Conforms with NR 116	_____	_____
6. Conforms with NR 117	_____	_____
7. Conforms with NR 180	_____	_____
8. Conforms with NR 340	_____	_____
9. Conforms with NR 345	_____	_____
10. Conforms with NR 346	_____	_____
11. Conforms with NR 347	_____	_____
12. 3500-23	_____	
13. NR 150 Type and compliance	_____	_____
14. Letter of objection if hearing under 227	_____	

6400I

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: October 31, 1988 FILE REF: 3550

TO: District Directors

Insert: Chapter 10, Water Reg Handbook

FROM: Scott Hausmann - WZ/6

Distribution: WRZ Program Staff Bureau of Legal Services

SUBJECT: Determining Substantive Written Objections for Hearing Requests

Chapter 30, as amended (1987 Act 374), requires that "substantive written objections" be provided in order for a hearing request to be granted.

The goal of requiring substantive objections is to give clear purpose to hearings - to ensure that a legitimate public interest exists to warrant the expenditure of public funds for conduct of a hearing and to ensure that the hearing contributes to the legal basis upon which the decision must be made. On one hand, hearings are a way of getting a sense of the risk that the public is willing to take with natural resources and to explore data and theories - both of which are necessary where our knowledge of a project or its impacts are imperfect. On the other hand, hearings should not be held strictly for personal reasons or to slow administrative proceedings.

Statutory Guidance [Sections 30.01 (6b) and 30.02 (3), Wis. Stats.] The new statute gives the following guidance on what constitutes substantive objections:

1. Requests must be written, not verbal.
2. Requests must be received within 30 (thirty) calendar days from the date of publication of the notice, not including the publication date.
3. Requests must include a statement that the person objecting or a representative will be present to testify at the public hearing.
4. Requests must describe specific reasons why the project or action would violate statutes.

Interpretation

Item 4 has two elements:

- a legal right or interest, public or riparian, referred to in statutes (legal terminology or statutory references are not required)
- a reason why the project or action may affect the right or interest described. Use professional judgement to answer the question of the relation between the action and effect. Generally, deny requests only where there is overwhelming evidence that the project or action could **not** have the alleged effect.

What is NOT a substantive objection

A request does not contain substantive objections if:

1. No reason is given

2. The right or interest cited cannot reasonably be construed as one that is protected by statute

3. There is overwhelming evidence that the project or action could not, directly or indirectly, have the impact cited.

When a hearing reguest is denied

Closely scrutinize all written objections to make sure that they meet the definition of "substantive written objections." Denial of a hearing request must be made in writing, explaining the reason(s) for denial and the procedure for appealing the denial to circuit court. During the next six months, while we are gaining experience with this provision, any denial of a hearing request should be discussed with the bureau to assure basic statewide uniformity in such denials.

Litigation concerning whether this provision meets due process requirements is a distinct possibility. In denying hearing requests, we must assure that our judgements are defensible under the statute.

Related Guidance: 7-18-84 Referred File Criteria
9-28-87 Preparation of Files for Hearings

Requested by:
Ken Johnson

Drafted by:
Mary Ellen Vollbrecht

Reviewed by:
Ken Johnson
Mike Cain

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

TO: District Directors

March 27, 1989

Insert: Ch. 10, Water Regulation Handbook

Distribution: All Program Staff

FROM: Robert Roden, WZ
James Kurtz, LC

SUBJECT: Requirements for DNR Permits in Department of Transportation Right of Ways

Recently, the Department of Transportation issued a legal opinion (attached) which concluded that it (DOT) was exempt from being a co-applicant for activities regulated under Chapters 30 & 31, Stats., conducted by other entities on DOT right of ways. Their opinion is based on the following:

1. The Department of Transportation is not required to apply for permits unless a statute specifically requires such.

2. Section 30.12(4), Stats., provides for activities under DOT's sponsorship to not require permits.

Although DOT is correct relative to activities "carried out under their direction and supervision in connection with highway and bridge design, location, construction, reconstruction, maintenance and repair" (emphasis added), we can not arrive at the same conclusion for regulated activities conducted by DOT or other entities which are not specifically mentioned in, or which are not in compliance with, the provisions of s. 30.12(4).

There are three basic situations that will dictate whether or not DOT is subject to the permitting requirements of the Department.

1) Activities conducted or administered by DOT or conducted by a duly authorized agent of DOT (contractor) within a DOT right of way, specifically mentioned in and complying with all of the provisions of s. 30.12(4), Stats., including DOT administered projects for local units of government, are exempt from the permit or approval requirements of sections 29.29, 30.11, 30.12, 30.123, 30.195, 30.20, 59.971, 61.351, 62.231, 87.30 or ch. 144 or 147 only. DOT and its duly authorized agents must still comply with all other permitting and/or approval requirements of law and administrative codes, not exempted under s. 30.12(4), regardless if within a right of way or not. It should be noted that the DOT/DNR cooperative agreement includes other activities such as railroad and airport projects that do not fall under s. 30.12(4), and are therefore subject to all provisions of law administered by the Department of Natural Resources.

2) Activities conducted by an entity other than DOT or its duly authorized agent within a DOT right of way, not held in fee title by DOT and not authorized by or under compliance with s. 30.12(4), Stats., must comply with all permit or approval requirements of law and administrative codes enforced by the Department of Natural Resources. If the regulated activity requires riparian status, the entity must either be the riparian, or a co-applicant with the riparian proprietor.

3) Activities conducted by an entity other than DOT or its duly authorized agent and within a DOT owned right of way and not authorized by or under compliance with s. 30.12(4), Stats., must comply with all regulatory

requirements of law and administrative codes enforced by the Department of Natural Resources. If the proposed activity requires riparian status, the entity must submit a copy of a DOT permit issued under s. 86.07(2), Stats., as well as a DNR permit application.

Drafted by: Dale Simon - WZ

Reviewed by: Ken Johnson - WZ
John Coke - WZ
Michael Cain - LC

cc: George Meyer - AD
Kathryn Curtner - EA
District Environmental Impact Coordinators
John Roslak - DOT/Madison

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

September 15, 1988 FILE REF: OGC 88-236

To: Marvin Schaeffer, Administrator
Division of Highways & Transportation Services

From: Philip Peterson, Deputy General Counsel
Office of General Counsel

Subject: DNR Navigable Water Permit
DOT Highway Right-of-Way Permit

The Town of Mercer proposes a dry hydrant on STH 51 right-of-way in Iron County. The Mercer hydrant will draw water by suction through a pipe from the Manitowish River 320 feet away. The Mercer dry hydrant is required for rural fire protection.

Mercer has already applied for and received a WisDOT permit authorizing the hydrant on STH 51 right-of-way. Section 86.07, Wis. Stats. Mercer has also applied for a DNR permit authorizing a dry hydrant suction pipe to draw water from the navigable waters of the Manitowish River. Section 30.12, Wis. Stats.

In an August 3, 1988, letter to Transportation District #7, Duane J. Lahti, a DNR Brule Area Water Management Specialist, states that as the riparian owner, WisDOT must be a co-applicant with Mercer for the requisite DNR permit. You ask, by September 7, 1988, request for legal service, whether DNR is legally correct when it concludes that DOT must be a co-applicant for the DNR permit. Under the applicable law, DOT should not need a DNR permit.

Beyond that stated conclusion, however, this matter is best considered by your Division's Bureau of Environmental and Data Analysis (BETA) . BETA Director John Roslak and his staff regularly consult with DNR about a range of DNR water permit questions affecting DOT. BETA regularly consults with DNR under a Cooperative Agreement between DOT and DNR and in accordance with statutorily established "interdepartmental liaison procedures." This memorandum, with copies of the materials you provided attached, is sent to John Poslak for his staff to review and to discuss with DNR as may be appropriate.

To support the conclusion that no DNR permit for DOT is required, some general observations are pertinent. First, a longstanding presumption of statutory interpretation is that a statute of general application is inapplicable to the state unless it is expressly or by necessary implication made applicable to the state. State ex rel. Dept. of Pub. Instruction v. ILHR, 68 Wis.2d 677 (1975) State v. Milwaukee, 145 Wis. 131, 135 (1911) ("it is a general rule that such statutes in general terms do not bind the state"); 3 SANDS, SUTHERLAND STATUTORY CONSTRUCTION S 62.01 and (3), Wis. Stats, the statutory language under which DNR requires navigability water permits, does not expressly mention DOT or other state agencies, DOT is exempt from the DNR co-applicant requirement that is applicable to other riparian owners. Second, sec. 30.12(4) (a), Wis. Stats., itself reads in relevant part as follows:

> Activities affecting waters of the state... carried out under the direction and supervision of (DOT) in connection with highway maintenance... are not subject to the prohibitions or permit or approval requirements specified under [sec. 32.12, Wis. Stats.] ....

This quoted language is authority to conclude that because the Mercer dry hydrant will be installed on DOT highway right-of-way, under a DOT permit issued by the State Highway Engineer for Maintenance, with the

accompanying DOT direction and supervision given to Mercer as the permitted, no DNR permit for DOT is required so long as DOT follows the established DOT-DNR "interdepartmental liaison procedures" suggested for BETA in the preceding paragraph.

Finally, I believe this memorandum responds to your inquiry and will enable DOT to resolve this matter so that the Town of Mercer can proceed as appropriate. If, however, you or others would like to discuss this matter or would like additional assistance, please let me know.

PP:ck

cc: Michael Jaskaniec
Ted Stephenson
Robert Hardie
John Roslak

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

Date: July 14, 1989 *File Ref.* 3500

To: Water Regulation & Zoning Program Staff

Insert: Put in Chapter 10, Water Regulation Handbook

From: Scott Hausmann - WZ

Subject: Al Johnson vs. DNR Decision

The attached memorandum and circuit court decision is important in that it can and should be used to avoid processing applications which have previously been reviewed and rejected after hearing.

PSH:el

Attach.

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: June 16, 1989 *FILE REF:* 3500

TO: James Kurtz - LC/5
George Meyer - AD/5
Bob Roden - WZ/6
Dave Jacobson - NWD
Bureau of Legal Services Attorneys

FROM: Michael Cain - LC/5

SUBJECT: Decision in Dane County Circuit Court in Alf Johnson vs. DNR

Attached please find a copy of the decision of Judge Mark Frankel in Dane County Circuit Court in the matter of Alf Johnson vs. DNR. This case involves a petition by a number of property owners for the Department to grant them approval to connect an enlargement to Spooner Lake. The Department of Natural Resources had previously reviewed this matter in a contested case hearing in 1978 and had denied a permit for essentially the same project. The Department received a petition for reconsideration in 1979 and denied the petition. The Department of Natural Resources moved to dismiss the current petition on the basis that the Department had previously made a decision on this matter.

Judge Frankel in his decision ruled that the Department of Natural Resources had shown that it had previously reviewed essentially the same application with the same parties and thus ruled in our favor based on "estoppel on the record." See page 7 of the attached decision.

The doctrine was novel to me (and apparently to the counsel involved in the case). While we do not have a great number of cases where this doctrine will be useful, there are occasionally cases where it can and should be used to avoid processing applications which have previously been reviewed and rejected after hearing.

You should note that the petitioner in this case has submitted another petition in this matter in an attempt to show that the situation has changed since 1979. We are not persuaded by their petition, and are again seeking dismissal.

MC:rh
v:\8907\lc9kurtz.mjc

Attachment

(AD-75)

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

Date: April 11, 1989 *File Ref:*

To: Michael Cain

From: Steven Wickland
Assistant Attorney General

Subject: Decision in Alf R. Johnson, et al. v. DNR
Case No. 88-CV-4217

Mike, the trial court has ruled on our motion to dismiss the petition for review. Judge Mark Frankel's April 6, 1989, memorandum decision and order has a dual effect: 1) it grants the motion to dismiss, and 2) gives leave to petitioners to submit another petition, should they be able to show clearly any specific environmental or citizen attitude changes since 1979 (the time of their request for DNR reconsideration of the first agency decision), and how their amended plans will adequately address those concerns. The court applied the principles of administrative res judicata, which we briefed extensively, but centered its ruling on the similar, but much lesser known doctrine of estoppel on the record. A copy of the decision and order is attached for your file.

SBW:sld

Enclosure

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch-12

ALF R. JOHNSON,
KEITH JOHNSON AND
THE NEST OF EAGLES FLIGHT
PILOTS ASSOCIATION

Petitioners,

Case No. 88 CV 4217

v.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,

Respondent.

MEMORANDUM DECISION AND ORDER

Petitioners Alf R. Johnson, Keith Johnson, and The Nest of Eagles Flight & Pilots Association (Petitioners) have brought this action for administrative review against the State of Wisconsin Department of Natural Resources (DNR) under Wis. Stats. Chapter 227. Petitioners challenge DNR's denial of their application to undertake a project to reopen a waterway located on Spooner Lake in Wisconsin. Specifically, petitioners allege DNR's denial of the application was arbitrary and in violation of their right of due process under sec. 227.57, Wis. Stats.; and that the findings by DNR at paragraphs 13 and 14 of the denial order are unsupported by substantial evidence. Petitioners request a judgment declaring the denial arbitrary and a remand to DNR for an administrative hearing upon the application.

DNR has filed a motion to dismiss the present action on three grounds. First, DNR alleges the action is in substance a request for a judicial review under sec. 227.52, Wis. Stats. and therefore untimely under sec. 227.53, Wis. Stats. Second, DNR alleges the application in question is essentially identical to one previously filed by the petitioners and reviewed and denied by DNR in 1978 and 1979, and is thus barred either as untimely or under the doctrine of res judicata. Third, DNR alleges the petitioners lack standing to bring this action because their complaint fails to set forth specifically what injuries the denial may have caused them.

In subsequent briefs the parties have agreed this is an action for judicial review and is timely in that respect. The remaining issues to be decided under this motion to dismiss are whether the petitioners have standing to bring this action, and if so, whether this petition should be dismissed as a result of res judicata.

For the reasons stated below, the petitioners have established standing as required under Wisconsin law. The petition as presented is, however, barred by the doctrine of estoppel by record. The motion by DNR to dismiss the petition will be granted, with leave to the petitioners to submit another action that addresses the concerns of DNR expressed in those petitions previously denied, and that qualifies as a new petition deserving of a hearing on the merits.

FACTS

Petitioners are riparian owners of real estate off a small harbor adjoining Spooner Lake in Washburn

County, Wisconsin. The artificial pond on which this property is located was originally created under a DNR permit granted to John A. Johnson in 1971. John Johnson, who died September 2, 1978, was Petitioner Alf Johnson's father. John Johnson's stated purpose for the pond was to, "create wildlife habitat and use [the pond] for recreation." DNR granted the 1971 permit upon a finding that it would not injure the public interest under the circumstances then existing.

In 1977, John Johnson made another application to DNR to connect the artificial pond to Spooner Lake and allow navigation into the lake. His stated intent was to develop single family homes, The Nest of Eagles Lodge, and a marina facility around the pond.

A public hearing was held on this petition August 9, 1978. DNR and 38 local citizens appeared with objections to the proposal. The petition was denied September 8, 1978. DNR expressed as a primary basis for denial its concern that the connection would cause increased nutrient loading to Spooner Lake, causing environmental pollution and negative impacts on water quality in the lake.

John Johnson did not seek administrative or judicial review of this denial within statutory time limits. On September 25, 1979, petitioners Alf R. Johnson and Keith Johnson, with Ruth Johnson, another riparian owner, petitioned DNR for reconsideration of the application denied in 1978. According to DNR, the petitioners suggested minor modifications in the dimensions of the proposed channel. DNR denied the petition for a rehearing by letter on November 12, 1979, and petitioners did not seek administrative or judicial review under the time limit set forth in sec. 227.53, Wis. Stats. Neither party has provided a copy for the record of either John Johnson's 1977 proposal, nor of the modifications proposed by petitioners in 1979.

Petitioners submitted the present application on November 20, 1987. DNR issued its denial June 27, 1988. Specifically, among its findings DNR stated, "The dimensions of the channel were somewhat smaller than the 1977 proposal, but it is essentially the same project which was reviewed and denied in 1978 and 1979." (Petition, Exhibit C, par. 12). DNR stated the water quality and environmental pollution concerns remain unchanged and that the project was still opposed by riparians on Spooner Lake, and for these reasons denied the petition. Id. par. 14, 16.

Petitioners allege this denial was arbitrary and in violation of due process; DNR argues petitioners lack standing and are also barred from bringing suit under the doctrine of res judicata.

STANDING

DNR bases its allegation that petitioners lack standing upon a failure to specify injury in the petition. DNR argues the petitioners have only identified themselves and the denial of their application, have merely made reference to alleged errors by DNR, and have not stated injury sufficient to confer standing under Wisconsin law. DNR takes the position this failure to clearly set forth a specific allegation of injury constitutes a basis for dismissal. Wisconsin case law is to the contrary.

The Wisconsin Supreme Court has established a two-part analysis to determine whether parties seeking to challenge an administrative rule have standing. Fox v. Wisconsin Department of Health and Social Services, 112 Wis. 2d 514, 524, 334 N.W. 2d 532 (1983). The first step is to determine whether the decision of the agency directly causes injury to the interests of the petitioner. Id. The second step is to determine whether the interest asserted is recognized by law. Id.

The law of standing in Wisconsin should not be construed narrowly or constrictively. Fox, 112 Wis. 2d at 524. When an actual injury is demonstrated even a "trifling interest" may be sufficient to confer standing. Id.

The petitioners have demonstrated injury sufficiently to confer standing under Wisconsin law. They allege they are riparian owners on Spooner Lake; that they submitted an application to open the waterway and to

proceed with plans for building and improving the area; and that this application was denied. None of these facts are disputed. DNR appears to rest its argument on a technical omission by petitioners to state, "We have suffered injury." A reading of the complaint in its entirety demonstrates sufficiently that the petitioners feel this denial has caused them injury.

The petitioners have also alleged injury to a legally protected interest, thus satisfying the second part of the test. In DeNava v. DNR, 140 Wis. 2d 213, 221, 409 N.S. 2d 151 (Ct. App. 1987), the court stated:

> "Sec. 30.12(2), Wis. Stats., simply reflects the rule that at common law riparian owners have certain rights incident to their ownership of land adjacent to water… A riparian owner has a right to build piers, wharf, booms, and similar structures in aid of navigation." Id.

While such rights are clearly subject to statutory requirements, they nonetheless must be accorded due process as required by statute.

ADMINISTRATIVE RES JUDICATA, OR ESTOPPEL BY RECORD

The final issue is whether petitioners' claim has previously been accorded due process protection and is thus barred by res judicata. It is DNR's position that this petition is essentially the same one submitted once by petitioner's father in 1978 and again by petitioners themselves in 1979. The 1978 petition was accorded a full public hearing; the 1979 petition was not. DNR alleges neither public nor environmental issues have changed, and since neither petition was appealed within the thirty-day time limit imposed by sec. 227.53(l)(a), Wis. Stats., the present petition is barred by virtue of res judicata.

Petitioners contend their plans have changed, and that this is their first petition. Alternatively, they argue there is no Wisconsin authority for DNR's position that res judicata may bar an application to an agency where the application is substantially identical to a previously denied application. This second assertion is incorrect.

If two requirements are met, administrative res judicata will bar relitigation of the plaintiff's claim in federal court. Garner v. Unicare Health Facilities, Inc., 651 F. Supp. 422t 423, (E. D. Wis. 1987). First, the administrative agency must have acted in a judicial capacity. Id. Secondly, the parties must have had a full and fair opportunity to litigate their case. Id.

A similar doctrine which neither party mentioned but which supports DNR's motion to dismiss is estoppel by records as set forth in Acharya v. AFSCME, Council 24, WSEU, 146 Wis. 2d 693, 432 N.W. 2d 140 (Ct. App. 1988). Estoppel by record is closely related to res judicata except that it is the former record, rather than the judgment which bars the second proceeding. Id at 696. Both rules require an identity of parties and an identity between the causes of action or the issues sued upon. Id. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact before it which the parties have had an adequate opportunity to litigate, courts have not hesitated to apply res judicata or collateral estoppel." Id at 697.

This record establishes that DNR has met the requirements for estoppel by record, as set forth under the general principles of collateral estoppel.

A. Identity of Parties

Generally, collateral estoppel precludes relitigation of an issue of ultimate fact previously determined by a valid final judgment in an action between the same parties. Kichefski v. American Family, 132 Wis. 2d 74, 78, 390 N.W. 2d 76 (Ct. App. 1986). In place of requiring mutuality of parties, Wisconsin courts now require that the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in question during the previous litigation. Id. The party must be given an opportunity to show that he or she did not have a fair chance procedurally, substantively or evidentially to pursue the claim. Id at 79-80.

Petitioners admit Alf Johnson's father made a similar petition to undertake a similar project in 1977. They do not dispute that a full public hearing was held in 1978 at which all parties appeared and presented evidence, and that it was upon the basis of this evidence the petition was denied. DNR also asserts that on September 5, 1979, the present petitioners requested reconsideration of what they described as suggesting minor modifications but was, "essentially the same petition." DNR states this petition for reconsideration was denied by letter on November 12, 1979, and petitioners did not seek review.

The only point at which petitioners imply disagreement with these facts is on the last page of their brief in which they state: "This application was these (petitioners') first." (sic). That assertion is belied by petitioners' own Exhibit A, a copy of the denial letter dated June 27, 1988. In that letter, addressed to Mr. Alf Johnson, it is stated: "In September, 1979, you made slight revisions to the proposal and requested that the Department reconsider the issue. The Department denied that request in November, 1979."

The petitioners do not attempt to deny the fact that they were the actual parties in a previous petition, nor that they failed to seek review of the 1979 denial. The identity of parties element is satisfied.

B. Identity of Issues

The doctrine of estoppel by record prevents a party from litigating again what was actually litigated or might have been litigated in a former action. Leimert v. McCann, 79 Wis. 2d 289, 293, 255 N.W. 2d 526 (1977). The second element of collateral estoppel requires the issue raised in the second suit be identical to that decided in the first proceeding, and that the controlling facts and applicable legal rules remain unchanged. Crowall v. Heritage Mutual Insurance Co., 118 Wis. 2d 120, 125, 346 N.W. 2d 327 (Ct. App. 1984).

In its Findings of Fact concerning the petition in question, DNR made the following specific findings:

13. The materials submitted by Alf Johnson and Keith Johnson do not constitute any significant change from the 1977 proposal and constitutes a request for rehearing in this matter.

14. The water quality concerns of the Department remain unchanged. The connection of the pond to Spooner Lake would cause increased nutrient loading to Spooner Lake, would cause environmental pollution and would have negative impacts on water quality in Spooner Lake.

15. The Department has reviewed and denied this application in 1978 and 1979.

16. The project is still opposed by riparians on Spooner Lake and by the Department.

Because the issue in question has already been determined by a final order in an action between the same parties, the burden is on the petitioners to demonstrate any legal or factual changes that have subsequently occurred regarding environmental concerns or citizen opposition and/or specific changes in their plans that would alleviate these concerns. Petitioners have failed to meet this burden. They admit in their brief that their predecessor in interest, "did file a petition in 1977 for similar administrative action" and, "That petition was denied." (Petitioners Brief, last page). However, they have not attempted to demonstrate how their plans have changed to make this a new issue for an independent administrative hearing. An observation that ten years have elapsed and a simple assertion that, "plans have changed" is not a sufficient basis to justify further consideration of the same question previously resolved on the merits.

ORDER

The facts on this record show that while petitioners have standing to request judicial review, the issue as represented has already been litigated and determined in a final action between the parties. In the interests of conservation of judicial and administrative resources and finality of administrative decisions, DNR's motion to dismiss this action is hereby GRANTED, with leave to the petitioners to submit another petition, should they be able to demonstrate with clarity any specific environmental or citizen attitude changes that have taken place since 1979, and how their amended plans will adequately address those concerns.

BY THE COURT

MARK A. FRANKEL
CIRCUIT JUDGE

DATED April 6, 1989

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: July 24, 1989

Insert: CH: 10 of The Water Regulation Handbook

TO: District Directors

FROM: Scott Hausmann

SUBJECT: Wood Preservatives in Water

Attached you will find several items which discuss the impact of wood preservatives in aquatic areas. The bottom line is that preservatives, creosote, pentachlorophenol and inorganic arsenicals, tend to leach into the water column but at a rate that is not considered harmful.

Requested By: Ed Bourget

Drafted By: Ken Johnson

Attachments

v:\8907\wz9presv.kgj

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

Date: January 15, 1985 *File Ref.* 4800

To: Robert Roden/WRZ-5

From: Russ Dunst/TS-2

Subject: Used R&R Ties for Shore Protection

EPA recently re-evaluated its regulatory position RE: creosote, pentachlorophenol, and inorganic arsenicals. This involved review and assessment of available information/technical literature, with recommendations from a Scientific Advisory Panel. EPAs requirements for the future were contained in the Federal Register, Vol. 49, No. 136 (Friday, July 13, 1984). I have attached a copy of the section dealing with creosote-treated wood. Identical statements were made for the other wood preservatives.

The PD#4 document was obtained in order to examine the basis for their decisions (attached; microfiche). Pages 217-221 are most pertinent RE: usage for shore protection. Leaching does occur but would not be a significant concern. I'm not aware of any project that would be of sufficient magnitude to pose a potentially serious problem. The document should be retained by WRZ, or sent to the DNR Library.

RD/bjb
Attach.
cc: Dale Urso/NCD

APPROVED: Llyod Lueschow/TS-2 DATE: 1/15/85

THE BIOLOGIC AND ECONOMIC ASSESSMENT OF

PENTACHLOROPHENOL
INORGANIC ARSENICALS
CREOSOTE

VOLUME 1: WOOD PRESERVATIVES

A report of the Pentachlorophenol, Inorganic Arsenicals, Creosote assessment team to the rebuttable presumption against registration of Pentachlorophenol, Inorganic Arsenicals, Creosote

Submitted to the Environmental Protection Agency on
November 4, 1980

UNITED STATES DEPARTMENT OF AGRICULTURE
IN COOPERATION WITH
STATE AGRICULTURAL EXPERIMENT STATIONS
COOPERATIVE EXTENSION SERVICE
OTHER STATE AGENCIES
U.S. ENVIRONMENTAL PROTECTION AGENCY

EXECUTIVE SUMMARY

The Environmental Protection Agency (EPA) issued notices of Rebuttable Presumptions Against Registration (RPAR) on creosote, inorganic arsenicals, and pentachlorophenol (penta) on October 18, 1978. The presumptions indicated that these products met or exceeded the risk criteria for various acute and chronic effects (40 CFR 162.11). Approximately 99% of of these chemicals are used in protecting wood products against wood-destroying organisms. The balance is used on a wide variety of sites as fungicides, herbicides, insecticides, rodenticides, defoliants, desiccants, growth regulators, sterilants, repellents, and disinfectants. It is estimated that 44.5 million pounds of pentachlorophenol, 42 million pounds of inorganic arsenicals, and 124 million gallons of creosote and coal tar are used annually.

There are no practical chemical alternatives to these RPAR'd materials for structural wood protection where the risk of attack by wood-destroying organisms is high. However, the RPAR'd materials could, in most cases, be used as alternatives for each other. This fact makes the task of evaluating the economic impact of a cancellation difficult. There are no practical alternatives (chemical and non-chemical) to the organic arsenicals as a cotton desiccant, grapefruit growth regulator, or for grape disease control and ant bait uses.

Wood Preservative Uses

The cancellation of all three of the RPAR'd wood preservatives would result in higher costs of 4.5 to $6.3 billion annually depending on which combination of substitute materials is used. The total costs would be higher than this because the 4.5 to $6.3 billion accounts for only 86% of the pressure-treated wood products and does not include the 475 million cu. ft. of wood protected by non-pressure-processes.

Pressure Treatments

The loss of all preservatives on railroad ties would result in average annual cost increases of $2.1 billion as railroads shifted to concrete ties. Virtually all ties are currently treated with creosote. A cancellation of creosote alone would result in average annual cost increases of $36.8 million if railroads shifted to penta-treated ties.

The loss of all three preservatives for wood poles used by utilities would result in average annual cost increases of 1.9 to $2.8 billion depending on the combination of concrete and steel poles that would be substituted.

Because all three materials are used to treat utility poles, the cancellation of any one or two of them while retaining the others would result in different impacts. If only creosote were used, average annual costs would increase by $45.7 million; use of only inorganic arsenicals would result in cost decreases of $51.8 million; and use of only penta would result in cost increases of $27.1 million.

The substitution ratio between steel, concrete, and wood piling affects the economic impact. If use of all three preservatives were canceled and concrete piling we re substituted for wood piling on a 1.0:1.5 basis, annual average cost would decrease by $21.5 million. However, if steel pilings were substituted on a 1.0:1.0 basis, costs would increase by $129.1 million. For technical reasons it is likely that substitution of concrete or steel for treated wood piling would fall somewhere between the ratios of 1.0:1.5 and 1.0:1.0. Therefore, the actual economic impact would lie between the figures presented.

The loss of all three preservatives on fence posts probably would not result in any significant cost changes if users shifted to steel posts. However, wood posts are often preferred to steel for aesthetic reasons.

The loss of all three wood preservatives for treating lumber, timbers, and plywood would cost from 485 million to $1,279 million depending on the combination of alternatives used. Alternatives include untreated cedar, redwood, or pine, concrete, steel, and chromated zinc chloride treatments. About 70% of all treated

lumber, timbers, and plywood is treated with inorganic arsenicals. Neither creosote nor penta is a satisfactory alternative for these uses.

Non-Pressure Treatment

The cancellation of both penta and creosote for groundline treatment of utility poles would result in increased costs of $35.3 million annually. Because penta and creosote are equally effective, with equal treatment costs, the loss of either one while retaining the other would not result in significant cost changes.

The loss of penta for sapstain control in lumber would result in a shift to Cu-8 with increased costs of $280,000 annually. The loss of penta for millwork and plywood would result in a shift to TBTO at an increased cost of $2.2 million or to Cu-8 at an increased cost of $4.8 million.

Non-Wood-Preservative Uses

Pentachlorophenol and Pentachlorophonates

The non-wood-preservative uses of penta are: Herbicide, defoliant, mossicide, and biocide.

There are effective chemical alternatives for all of the non-wood-preservative uses of penta. The alternatives accomplish the desired results at equal or lower cost. The impact of canceling penta for these uses would, therefore, be negligible.

Inorganic Arsenicals

The non-wood-preservative uses of arsenicals are: Desiccant, growth regulator (grapefruit), fungicide, insecticide, rodenticide, herbicide, and soil sterilant.

Of the 12 non-wood-preservative uses of arsenicals addressed, there are effective chemical alternatives for some, most of which can be used at equal or slightly higher cost. The four uses for which suitable alternatives are not available are: arsenic acid (cotton desiccant), lead arsenate (growth regulator--grapefruit), sodium arsenate (ant bait), and sodium arsenite (Black Measles--grapes). In addition, alternatives are not as effective as calcium arsenate for Poa annua control in turf, or for slug and snail control in California citrus.

Cancellation of arsenic acid for desiccation of cotton would reduce annual revenues of cotton producers in Texas and Oklahoma by an estimated 20'.3 to $49.9 million. Cancellation of lead arsenate for use on grapefruit as a growth regulator would reduce annual revenues of Florida producers by $5.8 million. If sodium arsenate were canceled for ant bait, householders could shift to other materials that would need to be applied more frequently, but total costs would be similar; however, if commercial extermination is selected as the control measure, the annual increased cost would be $42 million. Loss of sodium arsenite for control of Black Measles would result in increased vineyard establishment costs and losses from reduction in grape yields and quality totaling $13.3 million for producers of fresh market grapes and $11.0 million for producers of raisin-type grapes over a 6-year period following cancellation.

Creosote, Coal Tar, and Coal-Tar Neutral Oils

The non-preservative uses of creosote coal tar, and neutral oils are: Disinfectant, larvicide, insecticide, fungicide, herbicide, acaricide, arachnicide, and animal repellent.

Of the 15 non-wood-preservative uses of these chemicals addressed, only 5 are significant from the standpoint of frequency of use and volume of material applied. Drain fly and gypsy moth control (spraying undercarriage of vehicles) are two uses for which registered alternative chemicals are not available.

Fate in the Environment

Penta is ubiquitous in aquatic environments and its sources are unclear. It may result from direct contamination, from degradation of other organic compounds, or from chlorination of water. Penta may be removed from aquatic environments by volatilization, photodegradation, absorption, or biodegradation. Penta's moderate volatility suggests that volatilization may be a route to the atmosphere, but this is highly speculative. Persistence of penta in soil is extremely variable depending on pH, organic content, moisture content, clay mineral composition, free iron content, ion exchange capacity, and the microorganisms present.

Movement, persistence, and fate of arsenate in the environment are well known. Arsenate forms very insoluble compounds in soil and is generally moved only by erosion to aquatic environments where it may be adsorbed to sediment and removed from solution, adsorbed to plants, or ingested and metabolized by aquatic organisms. Under anaerobic conditions arsenate may be reduced to arsenite and metabolized to volatile alkylarsines. Volatilized arsenicals can be adsorbed on dust particles and oxidized to arsenate, methanearsonate, or cacodylate. Plants do not accumulate large quantities of arsenic if they grow well. Oceanic sediments are the ultimate sink for all arsenic.

Data on the environmental fate of the many chemical components of creosote and coal tar are limited. Naphthalene and its derivatives are rapidly biodegraded in both soil and water. The higher-boiling-point compounds such as fluorene, chrysene, anthracene, and pyrenes are much more slowly decomposed than naphthalenes. Available data are much too limited, however, to permit more than speculation on decomposition rates. Some studies have shown that reductions of these compounds in marine environments proceed exponentially with time and that residual amounts fall below the detection limit within 2 to 3 weeks.

Exposure

The no-observable-effect level for fetotoxicity of penta cited by EPA is 5.8 mg/kg/day. This value, divided by actual exposure, gives the safety factor. Varying exposures gave safety factors ranging from 20 to 580,000 for penta and 868 to 25 million for HxCDD. It is expected that the exposure in most work situations will result in safety factors above 100.

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

Date: November 6, 1989 File Ref: 3500

Insert: Chapter 10 Water Regulation Handbook

To: District Directors

Distribution: Program Staff

From: Bob Roden- WZ/6

Subject: Appeal Rights for Actions With No Notice

We have been advised by the Department of Justice that in view of the recent Court of Appeals decision, in R. W. Docks v. DNR, 145 Wis. 2d 854, (Ct. App. 1988), we need to revise our operating procedure in cases decided without notice or hearing. In R. W. Docks a decision to deny a dredging contract was appealed directly to the Circuit Court for review. The Court of Appeals eventually ruled that since no s. 227 Stats. hearing record existed there was "no record" to review and remanded the case back to us for a hearing.

In response to this decision it has been recommended that where we have neither issued a public notice nor held a hearing prior to making a decision, we should modify the Notice of Appeal Rights to direct the parties to request a contested case hearing in these cases rather than proceeding to judicial review.

The appeal rights option for decisions that do not require a public notice under 30.02 should be for the right to request a contested case hearing in accordance with section 227.42, Stats. Decisions made under the following shall include the notice of appeal rights language listed below:

1) Chapter 30: Sections 30.07, 30.10, 30.11, 30.12(3), 30.121, 30.125, 30.126, 30.13, 30.14, 30.19(l)(a), 30.195, 30.20, 30.206, 30.21, 30.25, 30.26, 30.27, 30.275.

2) Chapter 31: Sections 31.02, 31.12, 31.14, 31.18, 31.19, 30.20, 31.25, 31.26, 31.33, 31.34.

3) Section 59.971(6)

4) Section 87.30(l)(a)

5) Sections 61.351(6) & 62.231(6)

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

To request a contested case hearing pursuant to section 227.42, Stats., you have 30 days after the decision is mailed or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources.

This notice is provided pursuant to section 227.48(2), Stats.

Decisions made under other sections requiring public notice are unaffected and should include appeal language allowing for a contested case hearing or judicial review.

Requested by: Bob Roden- WZ

Drafted by: John Coke- WZ

Reviewed by: Ken Johnson- WZ
Scott Hausmann- WZ
Larry Larson- WZ
Mike Cain- LC

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

Date: May 18, 1990 IN REPLY REFER TO: 3550

To: District Directors

From: Scott Hausmann- WZ/6

PMMS Response
Insertion: Chapter 10 Water Regulation Handbook

Distribution: WRZ Program Staff
Fish Managers

Subject: Section 30.19 Fish Farming Exemption

We have been asked if the recent A.G.'s opinion of 3-8-90 regarding the new definition of agriculture found in s. 30.40(l), Stats., relating to the loss of exemption from s. 30.19, Stats., requirements for fish farming activities is effected by the Romeo case and a previous program guidance dated April 2, 1987 which expanded on the Romeo case.

The hearing examiner's decision in the Romeo case concluded that fish farming is included in the s. 30.19, Stats., exemption for agriculture based on the definition for agriculture under s. 70.32(2)(c), Stats. Using the logic of the 3-8-90 A.G.'s opinion, it follows that since the Chapter 70, Stats., definition is for real estate assessments whereas the Chapter 30, Stats., definition is for resource protection purposes, the Chapter 30, Stats., definition is more appropriately applied to s. 30.19, Stats., projects.

It was also asked if projects exempted from s. 30.19, Stats., based on the Romeo decision can be considered legal now in light of this A.G.'s opinion. Projects exempted after the Romeo decision and prior to the 3-8-90 opinion are considered legal. Decisions on s. 30.19, Stats., agriculture exemptions made after 3-8-90 should be based on the s. 30.40(l), Stats., definition that does not include fish and fur farming or forest and game management.

Requested by: Dale Lang- NCD

Drafted by: John Coke-WZ

Reviewed by: Ken Johnson- WZ
Mike Cain- LC

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

Date: June 10, 1991 *File Ref.*- 3500

To: District Directors

Chapter 10, Water Regulation Handbook

Distribution: Program Staff

From: Scott Hausmann - WZ/6

Subject: Water Quality Certification Language

Whoops, I goofed. We do not need to provide notice of judicial review for unnoticed decisions. Please discard the May 29, 1991, guidance and replace with this guidance.

Revisions to Chapter NR 299, Wis. Adm. Code, went into effect October 1990. Because of the revisions, new language is required for water quality decisions issued by the Department either individually or those included in Corps 404 public notices.

The following language and format should be used for Department issued water quality certification decisions.

WATER QUALITY CERTIFICATION LANGUAGE FOR DEPARTMENT NOTICES

GRANTING CERTIFICATION

A public notice is required for the grant or conditional grant of certification (if there is no Chapter 30 or 31 action). If there is no Corps notice or if the "request for certification" was used in the Corps notice, the following format and cover letter should be used:

SUBJECT: Application for Water Quality Certification

Dear _____:

We are enclosing a Notice of Water Quality Certification, issued by the Department of Natural Resources. NR 299.05(4)(b), Wisconsin Administrative Code, requires publication of this notice.

The Notice must be turned over to the (Newspaper) for publication as a Class 1 Notice. The cost of publication is to be borne by you. Proof of publication must be made by affidavit of the publisher with copy of the printed notice attached. Such proof must be filed with the Department of Natural Resources _____(Address)_____ after such notice has been published.

Your application cannot be processed further until completion of this requirement.

Sincerely,

_____
_____

cc: (Federal Regulatory Agency)
Regional Administrator, U.S. EPA, 230 S. Dearborn Street,
Chicago, IL 60604

NOTICE OF WATER QUALITY CERTIFICATION

(Applicant name and address) filed an application with the Department of Natural Resources for water quality certification pursuant to Section 401, Clean Water Act, and Chapter NR 299, Wis. Adm. Code. (*Applicant*) proposed to (_____)

The Department has evaluated this activity and determined that this activity will be conducted in a manner which will not violate the standards enumerated in Section NR 299.04 and certification is granted. The following conditions are necessary with respect to the discharge.

1. The applicant shall notify the Wisconsin Department of Natural Resources of its intent to start the discharge at least five business days prior to the beginning of the discharge.

2. Within 5 business days after the completion of the discharge, the applicant shall notify the Department of the completion of the discharge.

3. The applicant shall allow the Wisconsin Department of Natural Resources reasonable entry and access to the discharge site to inspect the discharge for compliance with the certification and applicable laws.

4. (Other conditions as necessary.)

NOTICE OF APPEAL RIGHTS (pursuant to s. 227.48(2), Stats.). Any person whose substantial interest may be affected by the Department's determination may request a hearing within 30 days after publication pursuant to NR 299.05, Wis. Adm. Code.

This determination shall become final in accordance with the provisions of NR 299.05(7), Wis. Adm. Code. The final decision of the Department shall be judicially reviewable as provided under ch. 227, Stats.

For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., you have 30 days after the decision becomes final to file your petition with the appropriate circuit court and serve the petition on the Department. The petition shall name the Department of Natural Resources as the respondent.

Dated at _____ Wisconsin.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES
For The District Director

_____
Name, Title

cc: (Federal Regulatory Agency)
Regional Administrator, U.S. EPA, 230 S. Dearborn Street
Chicago, IL 60604

WAIVING CERTIFICATION

A public notice is not required for waiving certification. However, there is a requirement to notify the applicant, federal permitting or licensing agency, the EPA Regional Administrator and known interested parties. The following format should be used.

Applicant's Name and Address

Salutation:

The Department of Natural Resources has evaluated your application for water quality certification pursuant to Section 401, Clean Water Act and Chapter NR 299, Wis. Adm. Code.

We have determined that your proposal to *(describe activity)(Use a, b, c below)*

a. will not result in a discharge and a waiver of certification is granted.

b. does not fall within the purview of the Department's water quality related authorities and a waiver of certification is granted.

c. the discharge from this activity will be regulated by the permit authority under Chapter 147, Stats., Wisconsin Pollutant Discharge Elimination.

Authorization may also be required by *(General type - zoning, solid waste, etc.)* laws for this activity.

(A paragraph commenting on the activity and recommending specific measure to minimize environmental impacts can and should be added here. The authority and requirement to do so is in s. NR 299.05(3)(c)3.)

NOTICE OF APPEAL RIGHTS (pursuant to s. 227.48(2), Stats.). If you believe that you have a right to challenge the decision stated in the paragraph above, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

To request a contested case hearing pursuant to section 227.42, Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources.

Dated at _____ Wisconsin.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES
For The District Director

_____
Name, Title

cc: (Federal Regulatory Agency)
EPA Regional Administrator

DENYING CERTIFICATION

A public notice is not required for denial of certification. However, there is a requirement to notify the applicant, federal permitting or licensing agency the EPA Regional Administrator and known interested parties. The following format should be used:

Applicant's Name and Address

Salutation:

The Department of Natural Resources has evaluated your application for water quality certification pursuant to Section 401, Clean Water Act, and Chapter NR 299, Wis. Adm. Code.

We have determined that there is not reasonable assurance that your proposal to *(describe activity:)* will comply with the standards enumerated in Section NR 299.04, and certification is denied.

Specifically, the Department finds:

NOTICE OF APPEAL RIGHTS (pursuant to s. 227.48(2), Stats.). If you believe that you have a right to challenge the decision stated in the paragraph above, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

To request a contested case hearing pursuant to section 227.42, Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources.

This notice is provided pursuant to section 227.48(2), Stats.

Dated at _____ Wisconsin.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES
For The District Director

_____
Name, Title

cc: (Federal Regulatory Agency)
EPA Regional Administrator

WATER QUALITY CERTIFICATION LANGUAGE FOR CORPS PUBLIC NOTICES

These are the three choices for s. 401 water quality certification language in the Corps of Engineers s. 404 Public Notices.

Choice 1 Waiver:

WAIVER OF CERTIFICATION. The State of Wisconsin, Department of Natural Resources has evaluated this activity for water quality certification pursuant to Section 401, Clean Water Act and Chapter NR 299, Wis. Adm. Code. The Department has determined that
(Choose a, b, or c)

a. no discharge will result from this activity and a waiver of certification is granted. Authorization may be required by _____ laws for this activity.

b. the activity does not fall within the purview of the Department's water quality related authorities and a waiver of certification is granted. Authorization may be required by _____ laws for this activity.

c. the discharge from this activity will be regulated by the permit authority under ch. 147, Stats., Wisconsin Pollutant Discharge Elimination. Authorization may also required by _____ laws for this activity.

The Department (has) (has not) provided comments about the activity and recommended specific measures to minimize environmental impacts.

NOTICE OF APPEAL RIGHTS (pursuant to s. 227.48(2), Stats.). If you believe that you have a right to challenge the decision stated in the paragraph above, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of this decision (pursuant to sections 227.52 and 227.53, Stats.), you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. The petition shall name the Department of Natural Resources as the respondent.

To request a contested case hearing pursuant to section 227.42, Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources. The filing of a request for a contested case hearing is not a prerequisite for judicial review and does not extend the 30-day period for filing a petition for judicial review.

Choice 2 Grant or Conditional Grant:

GRANT OR CONDITIONAL GRANT OF CERTIFICATION. The State of Wisconsin, Department of Natural Resources, has evaluated this activity for water quality certification pursuant to Section 401, Clean Water Act and Chapter NR 299, Wis. Adm. Code. The Department has determined that this activity will be conducted in a manner which will not violate the standards enumerated in Section NR 299.04, Wis. Adm. Code and certification is granted. The following conditions are necessary with respect to the discharge:

1. The applicant shall notify the Wisconsin Department of Natural Resources of its intent to start the discharge at least five business days prior to the beginning of the discharge.

2. Within 5 business days after the completion of the discharge, the applicant shall notify the department of the completion of the discharge.

3. The applicant shall allow the Wisconsin Department of Natural Resources reasonable entry and access to the discharge site to inspect the discharge for compliance with the certification and applicable laws.

4. (Other conditions as necessary.)

NOTICE OF APPEAL RIGHTS (pursuant to **s.** 227.48(2), Stats.). Any person who's substantial interest may be affected by the Department's determination may request a hearing within 30 days after publication pursuant to NR 299.05, Wis. Adm. Code.

This determination shall become final in accordance with the provisions of NR 299.05(7), Wis. Adm. Code. The final decision of the Department shall be judicially reviewable as provided under ch. 227, Stats.

For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., you have 30 days after the decision becomes final to file your petition with the appropriate circuit court and serve the petition on the Department. The petition shall name the Department of Natural Resources as the respondent.

Choice 3 Reguest:

REQUEST FOR WATER QUALITY CERTIFICATION. This public notice has been sent to the Wisconsin Department of Natural Resources and is considered by the District Engineer to constitute valid notification of that agency for water quality certification. A permit will not be granted until the Wisconsin Department of Natural Resources has issued or waived Section 401, Certification.

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September 6, 1991

TO: District Directors

3500 (WMC)
PMMS Response: Chapter 10, Water Regulation Handbook
Distribution: All Water Management Staff

FROM: Scott Hausmann - WZ/6

RE: Language for Department Notices of Quality Certification

Here are revisions of the language for Ch. NR 299 Water Quality Certification decisions:

GRANTING CERTIFICATION

A public notice is required for the grant or conditioned grant of certification (if there is no Chapter 30 or 31 action). If there is no Corps notice or if the "request for certification" was used in the Corps notice, the following cover letter and format should be used:

> COVER LETTER
> Applicant's Name and Address
>
> SUBJECT: Application for Water Quality Certification
>
> Dear _____:
>
> We are enclosing a Notice of Water Quality Certification, issued by the Department of Natural Resources. State law requires publication of this notice.
>
> The Notice must be turned over to the (Newspaper) for publication as a Class 1 Notice. The cost of publication is to be borne by you. Proof of publication must be made by affidavit of the publisher with copy of the printed notice attached. This proof must be mailed or delivered to the Department of Natural Resources (Address) after the notice has been published.
>
> Your water quality certification becomes final 30 days after publication unless a hearing is requested. We will contact you only if a hearing is requested.
>
> Your application cannot be processed further until completion of this requirement.
>
> Sincerely,
>
> _____
> _____
>
> cc: (Federal Regulatory Agency)
> EPA Regional Administrator

CERTIFICATION

NOTICE OF WATER QUALITY CERTIFICATION

(Applicant name and address) filed an application with the Department of Natural Resources for water quality certification pursuant to Section 401, Clean Water Act, and Chapter NR 299, Wis. Adm. Code. (*Applicant*) proposes to _____.

The Department has evaluated this activity and determined that this activity will be conducted in a manner which will not violate the standards enumerated in Section NR 299.04 and certification is granted. The following conditions are necessary with respect to the discharge:

1. The applicant notify the Wisconsin Department of Natural Resources of its intent to start the discharge at least five business days prior to the beginning of the discharge.

2. Within 5 business days after the completion of the discharge, the applicant shall notify the Department of the completion of the discharge.

3. The applicant shall allow the Wisconsin Department of Natural Resources reasonable entry and access to the discharge site to inspect the discharge for compliance with the certification and applicable laws.

4. (Other conditions as necessary.)

NOTICE OF APPEAL RIGHTS. Any person whose substantial interest may be affected by the Department's determination may request a contested hearing by serving a petition for hearing pursuant to the requirements of section 227.42, Wisconsin Statutes, on the Secretary of the Department within 30 days after publication.

This determination becomes final in accordance with the provisions of NR 299.05(7), Wis. Adm. Code and is judicially reviewable when final. For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., you have 30 days after the decision becomes final to file your petition with the appropriate circuit court and to serve the petition on the Department. The petition must name the Department of Natural Resources as the respondent.

Dated at _____ Wisconsin.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES
For The District Director

_____
Name, Title

WAIVING CERTIFICATION

A public notice is not required for waiving certification. However) there is a requirement to notify the applicant, federal permitting or licencing agency, the EPA Regional Administrator and known interested parties.- The following' format should be used.

WAIVER

Applicant's Name and Address

SUBJECT: Application for Water Quality Certification

Dear _____:

The Department of Natural Resources has evaluated your application for water quality certification pursuant to Section 401, Clean Water Act and Chapter NR 299, Wis. Adm. Code.

We have determined that your proposal to *(describe activity and then Use a, b, c below)*

a. will not result in a discharge and a waiver of certification is granted.

b. does not fall within the purview of the Department's water quality related authorities and a waiver of certification is granted.

c. the discharge from this activity will be regulated by the permit authority under Chapter 147, Stats., Wisconsin Pollutant Discharge Elimination.

Authorization may also be required by *(General type - zoning, solid waste, etc.)* laws for this activity.

(A paragraph commenting on the activity and recommending specific measure to minimize environmental impacts can and should be added here. The authority and requirement to do so is in s. NR 299.05(3)(c)3.)

NOTICE OF APPEAL RIGHTS. Any person whose substantial interest may be affected by the Department's determination may request a contested case hearing by serving a petition for hearing pursuant to the requirements of section 227.42, Wisconsin Statutes, on the Secretary of the Department within 30 days after the decision is mailed, or otherwise served by the Department.

Dated at _____ Wisconsin.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES
For The District Director

_____
Name, Title

cc: (Federal Regulatory Agency)
EPA Regional Administrator

DENYING CERTIFICATION

A public notice is not required for denial of certification. However, there is a requirement to notify the applicant, federal permitting or licensing agency, the EPA Regional Administrator and known interested parties. The following format should be used:

DENIAL

Applicant's Name and Address

Salutation:

The Department of Natural Resources has evaluated your application for water quality certification pursuant to Section 401, Clean Water Act, and Chapter NR 299, Wis. Adm. Code.

We have determined that there is not reasonable assurance that your proposal to *(describe activity)* will comply with the standards enumerated in Section NR 299.04, and certification is denied.

Specifically, the Department finds:

NOTICE OF APPEAL RIGHTS. Any person whose substantial interest may be affected by the Department's determination may request a contested case hearing by serving a petition for hearing pursuant to the requirements of section 227.42, Wisconsin Statues, on the Secretary of the Department within 30 days after the decision is mailed, or otherwise served by the Department.

Dated at _____ Wisconsin.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES
For The District Director

_____
Name, Title

cc: (Federal Regulatory Agency)
EPA Regional Administrator

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CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: October 31, 1991 FILE REF: 3520

TO: District Directors

Insertion: Chapter 10, Water Regulation Handbook

FROM: George E. Meyer AD/5

Distribution: All Program Staff
Bureau of Leg. Serv.
Bureau of Law Enf.

SUBJECT: After the Fact Permits Required for Enforcement Actions Where an Activity is Not Effectively Abated or Restored

I have developed this guidance to provide a framework for the uniform application of Ch. NR 301, Wis. Adm. Code, regarding after-the-fact permits (ATFPs). One of the primary purposes of developing NR 301 was to ensure that violations under Chapters 30, 31 and 88 Wis. Stats. which were not abated or restored would be authorized by an ATFP provided they would not cause environmental damage and would meet applicable statutory standards.

Following are a number of reasons why this guidance is necessary:

1) The enforcement and authorizing provisions in the statutes must be administered in harmony to a rational conclusion. Our statutes declare it to be unlawful to complete or maintain various regulated activities without proper authorization (permit or approval). Payment of a fine or forfeiture as a result of an enforcement proceeding does not alter this statutory mandate and end the illegal status of an activity.

2) Sections 30.294 and 31.25, Stats., declare unauthorized activities to be a public nuisance and provide for abatement. These statutory provisions should be enumerated in each violation citation and used in enforcement proceedings as support for abatement or requiring an application for an ATFP.

3) Subsequent enforcement actions are not prohibited unless an activity is abated or permitted [see s. 30.298(l), (2) and (3)].

4) Unless we require an ATFP, simply paying a fine or forfeiture becomes an unauthorized alternative "permit" procedure.

5) Unless we require an ATFP, people are encouraged to circumvent the law. The penalties for unauthorized activities are meant to serve as a deterrent and are an important aspect of our two pronged program (enforcement and authorization).

6) The payment of a fine or forfeiture is usually considerably faster and less expensive than providing the information, engineering and permit fees needed to apply for a permit or approval.

7) Unless we require an ATFP, the public has little or no opportunity to comment on or object to the activity that has taken place.

8) The issuance of a permit allows us to maintain an easily retrievable historical record in our authority index

that accurately describes a project including its size and location and who is responsible for its maintenance.

Therefore I am establishing this guidance for all Water Regulation and Zoning and Law Enforcement staff to require an ATFP application for a permit (or approval) where unauthorized activities are not fully abated or restored as a result of enforcement action. The application is to be processed in the same manner as any other application, except that conformance with the guidelines established in NR 301 is required and the permit should include appropriate documentation that the applicant initially proceeded without proper authority. Manual Code 4112.1 will be modified to reflect this policy. In any case where the unauthorized activity has not been completed or there is a residual feature that could be recognized as a violation (channel change, pond, seawall, rip rap or some other structure or deposit) ATFPs must be applied for. ATFPs should also be required when a public notice would have been required for a permit to allow riparians or the public an opportunity to object to a project that might adversely effect them. ATFPs should contain any necessary conditions, including requirements to modify a project, to assure compliance with statutory standards and prevent environmental damage. ATFPs are not to be used to simply "rubber stamp" otherwise unacceptable projects. ATFPs should be opposed where applicable statutory standards will not be met.

Notwithstanding the above guidelines, staff may continue to use their discretion whether to proceed with enforcement actions and/or ATFPs for minor violations where abatement or restoration is effectively achieved without formal action (e.g. minor dredging where littoral drift replaces removed material, damaged aquatic vegetation reestablishes itself, where we get voluntary restoration from the "violator", etc.).

I believe implementation of this guidance will lead to far fewer cases where unauthorized activities are left in "limbo" following local enforcement actions (which continues to be the preferred course of action). There will be occasional situations where the courts will not require what we feel is necessary to protect the environment or comply with the statutes. If this should occur, we only have two choices - appeal the decision or accept the court's action as sufficient disposition of the case. Additional enforcement proceedings under s. 30.03 are rarely an option once local enforcement actions have been completed.

In cases where we have reason to believe that local enforcement will not produce a satisfactory result, we should pursue full compliance through proceedings under s. 30.03, Stats.

Drafted by: Bob Sonntag

Reviewed by: Bob Roden
Ralph Christensen
Mike Cain

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: March 29, 1993

TO: Water Regulation & Zoning Staff

FILE REF:. 3550-1

Insertion: Ch. 3 Floodplain/Shoreland Mgt. Guidebook
Ch. 10, Water Regulation Handbook

FROM: Robert Roden WZ/6

Distribution: WRZ Program Staff

SUBJECT: Program Guidance for Hydrologic Analyses Completed or Approved by the Department of Natural Resources

The following guidelines are established for all hydrologic analyses used in the prediction of flood frequencies related to floodplain studies, dam evaluation studies, dam failure analyses, and Chapter 30 or 31 permit reviews:

1. Methods for hydrologic analyses must be consistent for similar situations found in floodplain zoning, dam hazard ratings, and/or review of Chapter 30/31 permits.

2. The minimum standard for hydrologic analysis will be to calculate flood flows using USGS Regional Regression Equations coupled with cross checking with other basins. Cross checking can be accomplished by simply reviewing the list of similar sized basins with similar basin characteristics already calculated in the USGS Regional Equation Manual.

3. For extremely small basins (less than 2 square miles) a minimum effort may include a TR55 or SCS synthetic hydrograph analysis coupled with a basin comparison or cross check.

4. The level of detail and the methodologies utilized for similar situations (i.e. simliar topography, basin size, type of project) should be consistently applied by all program staff. We have the authority and the responsibility to require more detail and/or documentation if sufficient information has not been submitted to meet the requirements of all program areas.

5. Prior to starting a hydrologic analysis all program staff should check for previous studies or ongoing work. Staff should always check the Floodplain Management Community Status Report. If there is an estimate of peak flood flows at that project location that:
   A) has been adopted by the governing municipality in accordance with NR116, or
   B) has been "approved" (see #9. below) by a WZ Engineer, then that data must be used for the project review.

6. If major inconsistencies or errors are noted with the adopted/approved hydrologic information, it may be revised. Prior to using the revised estimate, the reviewing engineer must reconcile the change with the existing data as follows:

   A. If there is an existing water surface model which utilizes the existing hydrologic data, the reviewer must retrieve the deck, make the appropriate changes in the model and supply the deck and

output to the Floodplain Unit. The revised Hydrology may then be used immediately, provided the Floodplain Unit agrees that the revised data is appropriate for adoption by the affected municipality(s) in the local FPZO.

B. If the existing Hydrologic data is not adopted under NR116, but has been 'approved' by a WZ engr., the reviewing engineer must advise that person of the change before proceeding. If the 'reviewer' and the 'approving' engineer disagree on the change, the matter will be resolved by Ken, Bob, and Dick.

7. If hydrologic data is not available for the project site then the engineer may develop his or her own estimate. (see #9 below).

8. All staff members who either initiate themselves or who become aware of the initiation of comprehensive hydrologic studies for large geographic areas or major revisions to past studies must record this information in the WZ integrated data base. This will assure that the entire staff will be made aware of the pending information.

9. At the completion of an analysis, or upon approval of existing data, the predicted flood flow must be entered into the WZ integrated data base. Responsibility for entry of this information as well as the study summary rests with the reviewing engineer and shall be accomplished as soon as possible after approval.

10. Approval of hydrologic data requires that the WZ engineering data base will be updated in the appropriate 'fields' including: the WZ engineer's initials, date of approval, designation for community adoption under NR116, and "pending" study information.

Requested By: Robert Watson & Richard Knitter

Reviewed By: Ken Johnson
P. Scott Hausmann
Robert Watson
Richard Knitter
Larry Larson

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: June 14, 1993 FILE REF: 3500

TO: District Directors

Insert: Chapter 10 Water Regulation Guidebook

FROM: Ken Johnson - WZ/6

Distribution: Water Regulation & Zoning Staff

SUBJECT: Interpretation of the Stoesser et al v. Shore Drive Partnership

Early this year the Supreme Court decided Stoesser et al v. Shore Drive Partnership. As you are aware, this case speaks to the transfer of riparian rights. Since there have been several questions from staff and out side attorneys alike concerning this case, the answers to which were not entirely clear to us, we felt it necessary to request clarification from the Bureau of Legal Services. Attached is a memo from Jim Kurtz discussing this case and the implications it may have on our program. Basically, the memo interprets the decision to have no or little effect on our program administration. Permit applications which we previously required fee ownership for must still show fee ownership. None-the-less, we suspect the case will come up in your future dealings with applicants and their attorneys.

Attachment

CORRESPONDENCE/MEMORANDUM **State of Wisconsin**

DATE: May 18, 1993 FILE REF: 8300

TO: Robert Roden - WZ/6

FROM: James Kurtz - LC\5

SUBJECT: Interpretation of Stoesser et al. v. Shore Drive Partnership

You recently requested an interpretation of Stoesser et al. v. Shore Drive Partnership, Case No. 91-0903 (January 19, 1993). Your questions involve the effect of this case on the transfer of riparian rights. Stoesser discussed the rights of an easement holder for access to navigable water. There is language in this case which some might interpret to have again allowed the unfettered placement of structures such as piers by non-riparian, back lot owners who have easements for either access alone or for the placement of structures. I believe that the case is more limited than that.

Stoesser involved riparians who were seeking only the right to use the lakeshore for "bathing, boating or kindred purposes". They specifically withdrew their request to place a pier adjacent to the easement. The court held that the back lot owners had riparian rights; interpreting such in this case to be a right of access. However, the court held that they are not riparian owners for statutory purposes. The following quote is illustrative:

"Cassidy and de Nava both dealt with the claim that an easement holder was a riparian owner for statutory purposes. In both cases the court of appeals correctly held that an easement does not confer upon its holder the status of riparian owner." slip op. pp. 7-8

Accordingly, the backlot easement holder can do whatever the easement allows provided such does not require compliance with a statutory provision which necessitates the status of one being a riparian owner. I have listed below those areas in which the status of riparian owner is required for the placement of a structure or for other activities involving navigable waters:

s. 30.12, Stats. - placement of structures generally
s. 30.121, Stats. - boat houses and houseboats
s. 30.13, Stats. - piers
s. 30.18, Stats, - diversions for irrigation or agriculture
s. 30.195, Stats. - changing stream courses

Other privileges authorized by ch. 30 Stats, are not dependent on riparian ownership or proprietorship. These include the following:

s. 30.126, Stats. - fishing rafts
s. 30.18, Stats - all other diversions
s. 30.19, Stats - enlargements
s. 30.20, Stats. - removal of material from beds of navigable water
s. 30.772, Stats. - placement of individual moorings
s. 30.773, Stats - designated mooring areas

As you can see, certain riparian privileges require riparian ownership status. Other riparian privileges simply require that the riparian consent, as is the case with the latter list. Accordingly, one does not need to be a riparian owner to place a mooring buoy as long as he or she has the permission of the riparian. The same is the case for the placement of fishing rafts. Presumably, where ss. 30.18, (other than for irrigation and agriculture) 30.19 and 30.20 do not statutorily require riparian ownership status, the riparian owner could transfer this privilege to another by easement.

You have listed in your opinion request a number of activities which you ask could be transferred by easement. The Stoesser case made it clear that those activities generally associated with access to the water and not requiring a permit from the Department dependent on ownership status, can be transferred by easement. Accordingly, the right to use the shoreline and have access to the waters, the right to have water flow to the land without artificial obstruction and the right to reasonable use of the water for domestic and recreational purposes could presumably be transferred by easement. The right to construct a pier is still dependent on riparian ownership status and could not be transferred by easement. Without having done a great deal of research on the matter, it is my view that the right to any lands formed by accretion or reliction is dependent on ownership status and could not be transferred by easement.

You also ask several specific questions. I will repeat those questions and attempt to give an answer.

1. Section 30.12 Wis. Stats. allows a riparian,owner to place structures for the owner's use. Formerly we have relied upon Cassidy and assumed that the right to place structures is reserved to riparian owners. Are we correct in assuming that the right to place structures under s. 30.12 Wis. Stats. cannot be transferred by easement?

As noted above, the placement and maintenance of structures is specifically limited by the language of s. 30.12 Stats., to riparian owners. Both Cassidy and de Nava remain good law to the extent that an easement holder is not a riparian owner. Accordingly, an easement holder still does not have the right to place a structure when a structure permit is required under s. 30.11, Stats.

2. Section 30.13 Wis. Stats. allows a riparian proprietor to place a pier or wharf in a navigable body of water. Formerly, we have assumed that a riparian proprietor is the same thing as a riparian owner, and have taken the position that only those with fee title ownership may place or cause a pier to be placed. How does this square with the court's statement in Stoesser? Can this right be severed by easement? If the answer is yes, how is our administration of Section 30.131 affected?

The de Nava case made it quite clear that an easement holder is not a riparian proprietor. In effect, it held that a riparian proprietor was the same as a riparian owner. Stoesser's language indicating that riparian rights could be transferred does not overrule the statutory requirement of riparian proprietorship or ownership prior to eligibility for the placement of a structure. As with rights under 30.12 Stats., the issue of the placement of a pier under s. 30.13, Stats., becomes somewhat more clouded because Stoesser indicated that riparian rights could be transferred by either an easement or license. We have indicated that riparian rights could be transferred by a license. (December 19, 1991 Program Guidance - Riparian Berths and Mooring) In other words, a riparian owner could allow another via a license to use a pier placed by that riparian owner. Stoesser seems to say that a similar transfer could take place by easement. Obviously, the issue has become a more difficult one.

The Department's traditional recognition of licenses for the authority to place a pier is based on Colson v. Salzman, 272 Wis. 397 (1956). The Colson Court's position is summarized in de Nava v. DNR 140 Wis. 2d. 213, 222 (1987) as follows:

> "It is worth noting that the Colson's court added, however, that the riparian owner could 'permit' (presumably by way of a license) the defendant and others to construct a pier, subject to the superior rights of the state." (footnote 8)

Neither s. 30.12 nor s. 30.13, Stats., were in effect at the time of the Colson decision. However, s. 30.02 Stats., which was the predecessor to s. 30.12 Stats., was in effect and did include the same requirement as s. 30.12 Stats., that the pier or structure be for the use of the riparian owner. Subsequent to the Colson decision, s. 30.13, Stats, was enacted (1959), which includes the requirement that the pier be constructed by the riparian proprietor.

Department policy, consistent with Colson, has recognized the use of short-term licenses for the transfer of the right to place a pier. The Department has construed the short-term, revocable status of a license as being sufficient assurance that the pier is placed with the permission and to the benefit of the current riparian owner and therefore, for that riparian owner's use.

A more difficult situation arises with easements. It is often difficult to distinguish an easement from a license in real property, but they are distinct in principle. An easement always implies an interest in the land in and over which it is to be enjoyed, whereas a license merely confers a personal privilege to do some act or acts on the land without possessing an interest in the property. Easements tend to be of a long-term nature and run with the land. A riparian owner can bind subsequent riparian owners to the terms of the easement, while a license does not have such effect.

In view of the above, it is my opinion that the use of an easement to convey the right to place a pier or wharf would be violative of the provisions of ss. 30.12 and 30.13, Stats. We cannot construe a right to place a pier which is transferred by easement as satisfying the riparian owner placement requirement of s. 30.13, Stats., or the requirement that the structure be placed for the owner's "own use" under s. 30.12, Stats. The irrevocable right to place a pier authorized by an easement would bind and may be detrimental to subsequent riparian purchasers. Thus while Stoesser allows for the use of easements to transfer riparian rights generally, their use for the transfer of the right to place piers would not be consistent with ss. 30.12 and 30.13 Stats.

3. Section 30.18 Wis. Stats. allows a riparian to divert water for the purpose of agriculture or irrigation. Can this right be severed by easement?

The answer to this question is noted above. In essence, it is no.

MAL:ccb
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cc: Mike Lutz - LC/5
Mike Cain - LC/5
John Fryatt/Tom Thoresen AD/5
Scott Hausmann - WZ/6
Ken Johnson WZ/6

No. 91-0903

STATE OF WISCONSIN SUPREME COURT

MARTIN JOHN STOESSER, MAX BERGER, HOWARD KEGEL, DANIEL BREDE, ROGER PITCEL, MARION STRASSER, and GREGORY SPENCER,

Plaintiffs-Appellants,

v.

SHORE DRIVE PARTNERSHIP, JOHN THEISEN, CHESTER BOJANOWSKI, and JAMES ERICKSON,

Defendants-Respondents.

APPEAL from a judgment of the Circuit Court for Walworth County: JAMES L. CARLSON, Judge. Reversed and Remanded.

JON P. WILCOX, J. This case comes to the court on certification from the court of appeals pursuant to sec. (Rule) 809.61, Stats. The issue is whether riparian rights can be conveyed to non-riparian landowners-by easement. We conclude that an easement can convey riparian rights to non-riparian landowners.

The facts are not in dispute. The plaintiffs-appellants (hereinafter "subdivision owners") are non-riparian landowners in the O-Tan-Kah Subdivision. The defendants-respondents (hereinafter "partnership") are riparian landowners along Lake Beulah having purchased its riparian land on September 15, 1989. The partnership operates a bar and restaurant known as the "Dockside." The subdivision owners claim the right to use the partnership's lakeshore to exercise riparian rights that were reserved in a 1939 warranty deed from their predecessors in title to the partnership's predecessor in title. The relevant portion of the deed states:

> the parties of the first part reserve for themselves, their heirs and assigns and the owners in O-Tan-Kah subdivision and any owners along the channel, the use of the channel as a means of ingress and egress, and also reserving to themselves and such owners, the right in common with the parties of the second part for themselves and guests to use the lake shore for bathing, boating or kindred purposes. . . .

Each year after the 1939 deed was executed the partnership and its predecessors in interest installed a pier on the lakeshore frontage. In the spring of 1989, the subdivision owners, for the first time since the execution of the 1939 deed, exercised the riparian rights they claimed by erecting a pier abutting the shore of the partnership's property. On April 7, 1990 the subdivision owners again erected their pier on the partnership's lakeshore. That same day the partnership removed the subdivision owners' pier claiming the subdivision owners had no right to erect a pier on its property.

The subdivision owners commenced this action on May 25, 1990, alleging that they had "lake rights . . . to swim, dock boats, and erect a pier along the shores of Lake Beulah." They no longer claim the right to maintain a pier. The subdivision owners sought declaratory relief setting forth their rights in the lake frontage of Lake Beulah and an injunction to prevent the partnership from placing a pier or other structure which would interfere with the subdivision owners' rights to use the lakeshore. The subdivision owners also requested compensatory and punitive damages.

The partnership moved for summary judgment arguing that riparian rights cannot be conveyed by easement. The circuit court granted the partnership's motion for summary judgment. The circuit court stated, "the case law has made it clear that a non-riparian owner has no rights, no riparian rights." The circuit court went on to rule that to the extent the deeds purported to convey riparian rights to non-riparian owners they were null and void and without force. The circuit court dismissed all of the causes of action brought by the subdivision owners.

The subdivision owners appealed. The court of appeals certified the following issue to this court: "Does prior case law of the Wisconsin Supreme Court and the Wisconsin Court of Appeals preclude a non-riparian owner's easement right to use a lakeshore for 'bathing, boating and kindred purposes?'" We accepted certification from the court of appeals.

When reviewing the grant of a summary judgment motion, this court is required to apply the standards set forth in sec. 802.08, Stats. just as the trial court was to apply those standards. Voss v. City of Middleton, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). We are not bound by a lower court's finding based upon undisputed evidence when that finding is ultimately a conclusion of law. N.N. v. Moraine Mut. Ins. Co., 153 Wis. 2d 84, 91, 450 N.W.2d 445 (1990). The facts in the instant case are undisputed. The certified issue presents a question of law which this court decides de novo.

A riparian owner is one who holds title to land abutting a body of water.[1] 78 Am. Jur. 2d Waters sec. 260 (1975). Riparian owners have certain rights, known as riparian rights, based upon title to the ownership of the bank or upland.[2] Colson v. Salzman, 272 Wis. 397, 400, 75 N.W.2d 421 (1956); Doemel v. Jantz, 180 Wis. 225, 230, 193 N.W. 393 (1923). Riparian rights are not common to the citizens at large, but exist as natural and inherent incidents of the ownership of riparian land. Doemel, 180 Wis. at 231; 78 Am. Jur. 2d Waters sec. 262 (1975). The riparian rights relevant to this case are the right of access to a lake and the privilege that goes along with that right to use the lake and lakeshore for bathing, boating and kindred purposes.

None of the subdivision owners who are plaintiffs in this case own riparian land. The subdivision owners claim riparian rights through the easement reserved in the 1939 deed.[3]

It is clear that the mere fact that one owns property abutting a natural body of water presumptively confers certain rights. Mayer v. Grueber, 29 Wis. 2d 168, 174, 138 N.W.2d 197 (1965). However, one who acquires land abutting a body of water may acquire no more than is conveyed by his deed. Id.

In the instant case, the partnership claims exclusive rights to use its lakeshore. However,-the partnership's predecessor in interest, granted an easement to the subdivision owners allowing them to use the lakeshore for bathing, boating or kindred purposes. This easement was a part of the partnership's predecessors deed which was recorded in the Walworth County Register of Deeds office on March 23, 1939. The easement was recorded and gave notice to subsequent purchasers of the subdivision owners rights. The easement bound future owners.

An easement has been defined in Wisconsin as a liberty, privilege, or advantage in lands, without profit, and existing distinct from the ownership of the land. Colson, 272 Wis. at 401. In the case of an easement title does not pass but only the right to a limited use of the land of another. Id. The subdivision owners did not become riparian owners based upon the easement; but they did obtain the right to use the partnership's lakeshore to access Lake Beulah for bathing, boating and kindred purposes.

All members of the public have the right to use Lake Beulah for swimming, bathing and boating purposes subject to regulation by the legislature and state agencies. The state holds the lake bed and water in trust for the public. However, members of the public do not have the right to access Lake Beulah by way of the partnership's private property. The easement allows the subdivision owners access to Lake Beulah via the partnership's property to exercise their public rights.

Because the easement was created by deed we must look to that instrument in construing the relative rights of the parties. Hunter v. McDonald, 78 Wis. 2d 338, 342-43, 254 N.W.2d 282 (1977). The use of the easement must be in accordance with and confined to the terms and purposes of the grant. Id. 78 Wis. 2d at 343.

In this case the deed reserved for the subdivision owners the right "to use the lake shore for bathing, boating or kindred purposes. . . . " Since one cannot bathe or boat on the shore this language was obviously intended to allow the subdivision owners access to Lake Beulah from the partnership's lakeshore. The subdivision owners seek to use their easement for the purposes expressly stated in the deed and must be allowed that right.

The partnership argues that riparian rights in a natural lake are exclusively vested in the riparian land owner and cannot be transferred by easement. The partnership asserts that the easement granting riparian rights to the subdivision owners is null and void as contrary to Wisconsin law. We disagree.

Wisconsin follows the general rule that riparian rights can be conveyed to non-riparian owners by easement. Mayer, 29 Wis. 2d at 175 quoting Burby, Real Property sec. 18; Williams v. Skyline Development Corp., 288 A.2d 333 (Md. 1972); Thurston v. City of Portsmouth, 140 S.E.2d 678), 680 (Va. 1965); Mianus Realty Co. v. Greenway, 193 A.2d 713, 715 (Conn. 1963); Fitzstephens v. Watson, 344 P. 2d 221, 229 (Or. 1959) ; 78 Am. Jur. 2d Waters sec. 278 (1975); 1 Waters And Water Rights, secs.-7.04(a)(1), 7-04(a)(2), 7.04(a)(3) (Robert E. Beck,ed. 1991).

The partnership relies on Colson, Cassidy, and de Nava v. Dept. of Natural Resources, 140 Wis. 2d 213, 409. N.W.2d 151 (Ct. App. 1987), for the proposition that riparian rights cannot be transferred by easement. However, these cases do not support the partnership's argument. The cases relied on by the partnership dealt with the issue of whether an easement holder was a riparian owner. In the instant case, the subdivision owners do not argue that they are riparian owners, but that the easement conveyed the riparian right of lake access to them.

In Colson, the court held that an easement does not confer the status of riparian owner upon the easement holder. Colson, 272 Wis at 401. The court noted that the riparian owner could permit nonriparian owners to construct piers off its lakeshore subject to the superior rights of the state and federal government. Id. Colson provides support for the rule set forth in this case that riparian rights can be conveyed to non-riparian owners by easement.

Cassidy and de Nava both dealt with the claim that an easement holder was a riparian owner for statutory purposes. In both cases the court of appeals correctly held that an easement does not confer upon its holder the status of riparian owner. Cassidy, 132 Wis. 2d at 161; de Nava, 140 Wis. 2d at 221.

The statement in de Nava "that the grantee of an easement acquires no riparian rights in natural waters, even if the easement purports to grant such rights," misstates the holding in Colson and the rule of law in Wisconsin. Colson held that riparian ownership cannot be conferred by easement. Colson permitted the continued use of a riparian right pursuant to an easement.

The rule of law in Wisconsin is that a riparian owner may grant or reserve an easement for access to a lake. The easement does not confer any ownership rights on the easement holder. However, the easement does convey an interest in the land to use the land in accordance with the terms of the easement. Riparian rights can be conveyed by easement to non-riparian owners.

Public policy supports the rule that riparian rights can be conveyed by easement. A deed, like any instrument, should not be rewritten by the court. If the court could rewrite or invalidate private contractual agreements, it would destroy the certainty upon which contracting parties are entitled to rely.

There are many non-riparian landowners in Wisconsin with lake access easements similar to the one in the present case. A rule of law validating lake access easements protects the clear expectations of non-riparian

landowners who have relied on these easements for many years. The rule that riparian rights can be conveyed by easement carries out the obvious intent of the parties who entered into lake access easements.

We conclude that riparian rights can be conveyed by easement to non-riparian owners. In the instant case, the intent of the parties was that the subdivision owners have access to Lake Beulah by way of the partnership's property. The easement is valid and reserved for the subdivision owners the right of access to Lake Beulah.

For the reasons set forth we reverse the judgment of the circuit court and remand the cause for further proceedings not inconsistent with this opinion.

By the Court: The judgment of the circuit court is reversed and the cause remanded.

[1]Strictly speaking, a riparian owner is one whose land abuts upon a river and a littoral owner is one,wli6se land abuts upon a lake. 78 Am. Jur. 2d Waters sec. 260 (1975). However, most Wisconsin cases make no distinction in applying the terms "littoral" and "riparian." Mayer v. Grueber, 29 Wis. 2d 168, 174, 138 N.W.2d 197 (1965). In Wisconsin the term "riparian" is acceptable as to land abutting upon either rivers or lakes.

[2]Riparian rights are well defined in Wisconsin law. They include: the right to reasonable use of the waters for domestic agricultural and recreational purposes; the right to use the shoreline and have access to the waters; the right to any lands formed by accretion or reliction; the right to have water flow to the land without artificial obstruction; the limited right to intrude upon the lakebed to construct devices for protection from erosion;, and the right now conditioned by statute, to construct a pier or similar structures in aid of navigation. Cassidy v. Dept. of Natural Resources, 132 Wis. 2d 153, 159, 390 N.W.2d, 81 (Ct. App. 1986).

[3]An easement can be created by a reservation or any language in a contract, deed or will expressing an intent to create an easement. 1 The American Law of Real Property sec. 6-.02[5][al] (Arthur R. Gaudio ed. 1992); 3 Richard R. Powell, The Law of Real Property sec. 407 (1992); William E. Burby, Real Property sec. 27 (3rd ed. 1965). An easement can also be created by implication, prescription or adverse use. 1 The American Law of Real Property sec. 6.02[5].

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: June 22, 1993 FILE REF: 3500

TO: WZ District Managers
Water Management Specialist
Water Regulation Section staff
Bureau of Legal Services

Insertion: Ch. 10 Water Regulation Handbook

FROM: Robert Roden - WZ/6

SUBJECT: Formulation of program guidance

Over the years the Department has developed numerous program guidance which aid us in our attempt to uniformly interpret statutes and codes. Some of these guidance have been very complex and taken exceptionally long periods of time to develop. Others have ended up generating lots of staff frustration and still lacked the appropriate quality control. In order to shorten the time it takes to bring a issue to closure and in order to improve the overall quality of our program guidance material I am amending our program guidance process. For instances where a program guidance is needed and appropriate, procedures include:

A. Logging and Tracking. All program guidance request will be assigned a Program guidance number and will be logged and tracked by the Bureau Program Assistant. All existing program guidance will also be assigned a program guidance number and will be indexed by subjects addressed for easy reference. Copies of the updated index will be distributed to holders of the Water Regulation handbook on a semi annual basis.

B. Routine request, From time to time, there will be issues that are of immediate concern that can be easily answered by the Bureau. For most of these issues full input from the program management team is unnecessary. In such cases the appropriate section will assign and develop the program guidance and seek district input. District input will generally consist of soliciting a representative district to comment at the first draft stage.

C. Program Management Team request. The program management team (PMT) may also identify issues that need to be addressed through program guidance. The PMT will keep a running list of issues that need to be resolved and assign a priority to each item. Needed guidance that can be easily addressed will be handled by the Bureau/Section with appropriate input from districts.

D. Complex request, These types of guidance are generally those where there is no black and white law on the issue and the case law does not give us sufficient direction. In other words, these issues are those where the program has some discretion on the direction it takes. Complex or difficult to resolve program guidance will be assigned a Bureau project manager who will have the responsibility of developing individual program guidance. The project manager's responsibilities are two fold; first, work with other supervisors to select a drafting team to develop the guidance and second, represent the PMT's interest in formulation of the guidance.

The Drafting team will be selected based upon a variety of criteria:

a) Select individuals with program knowledge concerning the issue to be addressed.
b) Teams should be small to insure that logistics don't get cumbersome. Generally no larger than four people.
c) Since we believe that diversity on the team will lead to stronger better reasoned documents, the team should have a diverse background. Elements that contribute to diversity are 1) station (central office,

district, area) 2) program (Water Reg, Floodplain Zoning, Shoreland Zoning, Dam Safety) 3) discipline (Biologist, PPA, Engineers)

d) Where appropriate we should try to involve a member of the WCCA in the drafting team.

The Drafting team will be responsible for putting the document together and submitting it to the project manager within 60 days of assignment. During formulation of the guidance, the project manager is responsible for guiding the team and making sure the project is completed on time. The suggested steps for this process are as follows:

- Project manger reviews the issue within the team as necessary.
- Drafting team selects a lead worker responsible for putting the document together.
- Drafting team raises issues that cannot be resolved among the team and prepares an outline of the suggested reply.
- Project manager resolves disputes and finalizes outline.
- Drafting team prepares guidance.
- Project manager reviews and amends first draft.

After the guidance is complete the project manager will submit the guidance to the Bureau for review. The Bureau will either suggest amendments to the document and work with the project manager to develop a final copy with signatures or schedule the issue to be reviewed by the PMT.

The PMT will resolve remaining issues as appropriate and recommend solutions. The Bureau Director will either accept the PMT recommendation or decide the course of action necessary.

Drafted by: Ken Johnson

Reviewed By: Larry Larson
Scott Hausmann

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: November 22, 1993

PMMS Response
Insertion: Chapter 10 Water Regulation Guidebook

TO: WZ Program Managers
WZ Specialists
Water Regulation Section Staff

FROM: Scott Hausmann

SUBJECT: Court of Appeals Decision on Riparian Rights and Easements
REPLACES OCTOBER 29, 1993 TRANSMITTAL MEMORANDUM

Attached is a recent unpublished Court of Appeals decision that affirms the 1899 Wisconsin Supreme Court decision, Village of Pewaukee v. Savoy. It holds that the government has the riparian rights associated with government (public) roads contiguous to waterways, regardless of whether the government holds outright title or an easement.

This decision did not address, or overrule, the requirement stated in prior cases that certain riparian rights can only be exercised by a riparian owner (ownership being in the form of fee title). Furthermore, because the decision is unpublished, it sets no statewide precedent and its effect is limited to the Town of Maplehurst case itself. Therefore, we will continue to operate under the general rule that easement holders are not eligible to place piers or to apply for permits as a riparian owner or proprietor.

cc: Mike Cain - LC/5
Mike Lutz - LC/5

COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 28, 1993

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1)

NOTICE:
This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 92-2899

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT III

TOWN OF MAPLEHURST,

Plaintiff-Respondent,

v.

DARRELL W. HOWSDEN, SR.,
IRMA HOWSDEN,
MARK NOSKO
and DEBRA VISSER,

Defendents-Appellants

APPEAL from an order of the circuit court for Taylor County: GARY L. CARLSON, Judge. *Affirmed.*

Before Cane, P..J, LaRocque and Myse, JJ.

PER CURIAM. Several owners of a real estate appeal a trial court order declaring that the Town of Maplehurst owns the riparian rights associated with a town-owned road lying adjacent to and terminating on the Black River. Appellants' parcels lie on both sides of the road. In prior proceedings involving the town and appellants, the trial court ruled that the town had acquired the road by adverse possession by operation of sec. 80.01(2), Stats., and by authority of sec. 80.01(4), Stats. The trial court also then enjoined appellants from obstructing the use of the road, including any acts designed to mislead the public into believing that the road was a private one. Appellants had claimed ownership of the road before the trial court declared the town's interest.

In the new trial court proceedings, which appellants appeal, the town sought to hold the appellants in contempt for constructing an ice wall across the road. The town also sought amendment of the injunction to bar appellants from blocking the public's right of ingress and egress to the Black River, thereby raising the issue of riparian rights. Appellants make four arguments on appeal: (1) The town does not own the riparian rights associated with the road; (2) the trial court violated principles of res judicata by considering the riparian rights

issue; (3) the town's failure to join the state as a necessary party invalidated the court's order; and (4) the motion for contempt's failure to provide direct evidence of contempt violated due process. We reject these arguments and affirm the trial court order.

The trial court correctly ruled that the town owned the riparian rights associated with the road. In *Village of Pewaukee v. Savoy,* 103 Wis. 271, 79 N.W. 436 (1899), the Wisconsin Supreme Court laid down a universal rule applicable to riparian rights associated with government-owned roads lying contiguous with bodies of water. The court held that the riparian rights belonged to the government, irrespective of whether the government's interest in the road was in fee or merely an easement. *Id*. at 278-79, 79 N.W. at 438-39. In other words, if the government acquired only an easement, it nonetheless acquired the property's riparian rights, despite the common-law rule that easement holders generally have no riparian rights. Here, the town acquired an interest in the road. Under *Savoy,* this acquisition furnished the town the full riparian rights by operation of law, regardless of the nature of the interest it acquired in the road itself.

We reject appellants' argument that the trial court violated the rules of res judicata. This doctrine prevents the litigation of matters that the parties did litigate or should have litigated in earlier proceedings. *Schaeffer v. State Personnel Comm'n, 150* Wis. 2d 132, 138-39, 441 N.W.2d 292, 295 (Ct. App. 1989). Here, the town acquired the riparian rights by operation of law, not by operation of the trial court's original judgment. When the trial court issued the order regarding the riparian rights, the court was merely formally declaring those rights that the town had already acquired under the *Savoy* doctrine. The fact that the first judgment did not expressly mention riparian rights did not in any way deprive the town of rights it acquired by operation of law. Moreover, the order supplementing the judgment was more in the nature of enforcing the rights accruing under the judgment, not in the nature of amending the judgment.

The town's failure to join the state in the suit does not affect the validity of the UW court's ruling. Section 803.03(l) and (2), Stats., states the criteria for joining a necessary party. In general, these provisions require joinder of parties (1) whose interests the judgment might impair, (2) whose nonjoinder might prevent the existing parties from obtaining complete relief, or (3) whose absence might expose the existing parties to multiple liability. Here, appellants have provided no persuasive reason why the town had an obligation to join the state in a case adjudicating the town's, not the state's, riparian rights. Appellants have not shown how the state's joinder would meet any of the statute's concerns. Moreover, the state did participate m the trial court proceedings as amicus curiae, filing a brief in support of the town's legal position. The state has also filed an amicus brief on appeal supporting the town's legal position. In neither case has the state asserted an interest that it believed made it a necessary party under the statutory criteria. Under these circumstances, where the state endorsed the town's legal position, appellants have not established prejudice from the town's failure to join the state as a formal party. *See* sec. 805.18, Stats.

Finally, we reject appellants' argument that the town's contempt motion was constitutionally inadequate for containing insufficient facts to identify appellants as the persons who violated the trial court's injunction. Appellants moved the trial court to dismiss the town's motion on that basis. However, the trial court declined to address appellants' motion to dismiss. Rather, the trial court held the motion in abeyance pending the court's resolution of the riparian rights question. Appellants then appealed before the trial court could address their motion to dismiss. Under these circumstances, the adequacy of the town's contempt motion is not properly before us on appeal.

In any event, we conclude that the town's contempt motion was adequate. The motion and supporting documents stated on their face that the town did not know who had committed the contemptuous acts. According to appellants, the trial court should have dismissed the motion on its face for lacking direct evidence of appellants' guilt. This argument lacks merit. Because of the parties' prior disputes, the town had strong circumstantial evidence that appellants were the ones who had committed the contemptuous acts. Although the town's motion admitted that the town did not have direct evidence of the perpetrators' identities, proof of identity can be established by circumstantial evidence. The pleadings consequently stated a basis for a claim of

contempt.

By the Court.—Order affirmed.

This opinion will not be published. *See* Rule 809.23(1)(b)5, Stats.

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**
Department of Natural Resources

DATE: August 18, 1997 **FILE REF:** 3550

TO: Water Management Specialists
Regional Aquatic Habitat Experts
Rivers & Regulations Section

FROM: Mary Ellen Vollbrecht, FH/6

SUBJECT: Referred File Procedure - Revision

Attached is a very slightly revised memo on our referred file procedure. Please keep it in your Water Regulation Handbook (chapter 10).

I'm re-sending the memo because we've received several files recently without background memos. The one-page summary of the case is crucial to make the most efficient use of Mike Cain's time and the time of other attorneys who will be assigned to help him out.

The only change to the memo is to add witness names, specifying what they would testify and any schedule conflicts. (And correcting the handbook chapter reference.)

Thanks for your cooperation!

CORRESPONDENCE/MEMORANDUM **State of Wisconsin**
Department of Natural Resources

DATE: August 18, 1997 FILE REF: 3550

HANDBOOK CH. 10

TO: Water Management Specialists Regional Aquatic Habitat Experts Rivers & Regulations Section

FROM: Mary Ellen Vollbrecht, FH/6

SUBJECT: Referred File Procedure

Uniform, complete information in referred files - and consistent, streamlined review of cases - will help us resolve contested cases as quickly and effectively as possible. The information below reiterates our existing process for newly involved staff - and is intended to help add some additional efficiency and consistency.

Background
Files are referred for contested case hearings in four situations (case types):
1. a decision to deny a permit for an activity requiring public notice
2. a decision that substantive objections can't be informally resolved (project could be authorized)
3. a decision to seek administrative enforcement of a violation (highly technical or complex cases or cases that for other reasons do not go through local court)
4. appeal of department decision (prompted by copy of Secretary's letter granting hearing)

The referred file provides background for administrative law judges, Department administrators and legal counsel.

Three principles to keep in mind when preparing and reviewing referred files:
- Ensure complete, well organized information
- Ensure consistency
- Exhaust persuasive opportunities

We routinely try to convince applicant to modify the project or use a different way to achieve their purpose. Where we are not opposed, we should also routinely bring applicants and objectors together to clarify and address objections to the extent possible. This step can result in improved public interest protection, efficient hearing preparation or withdrawal of objections.

Review Process

1. WMS prepares brief case summary (one or two pages) and file material; sign off, briefing of, or copy of summary to, basin leader, regional expert and/or media leader (TO BE DETERMINED BY REGION).

2. Send package to statewide case manager (Elly Lawry, FH/6) for log in and subsequent tracking. Case manager consults section chief for assignment of section reviewer and routes file to reviewer.

3. Section reviewer checks file for clarity, completeness (evidence for jurisdiction, authority and decision, persuasion efforts), statewide consistency and additional persuasion ideas. Discuss policy issues and persuasion options with WMS and section chief. Sign off on case summary and send to legal counsel. Copy case summary

(without attachments) to bureau director and division administrator. For enforcement cases, brief division administrator and bureau director.

4. Legal counsel reviews file for completeness, legal consistency, remaining persuasive opportunities. Determine priority and route to the Division of Hearings and Appeals.

A list of file contents and and outline of the case summary is attached. Be sure to use the referred file checklist in chapter 10 of your Water Regulation Handbook.

cc: Regional Water Media Leaders
Water GMU Leaders
Lee Kernen, FH/4
Mike Cain, LC/5

OUTLINE FOR REFERRAL MEMO

To: Eleanor Lawry, FH/6

From: Joe Smith, XXR

Re: Case (person's) Name Case Type (denial, objections, enforcement, appeal) Docket Number

1. Fact situation
    A. Actual or proposed waterway/wetland activity
    B. Name, location and description of waterway/wetland
    C. Public interest functions uses of waterway/wetland

11. Decision rationale and summary of evidence
    A. Jurisdiction (how do you know? witness name)
    B. Public interest impacts (what are they? how do you know? witness names)
    C. Other issues to be decided at hearing (e.g., process? witness names)
    B. Applicant or objectors perspective as we understand it
    C. Any other involved parties and their interests

IV. Chronology
    A. initial/complete application date(s)
    B. decision date
    C. other key dates
    D. persuasive efforts

V. Witness data (names, availability in next three months)

CORRESPONDENCE/MEMORANDUM **State of Wisconsin**

DATE: October 29, 1997 REF: 8300

TO: Division Administrators .Bureau Directors Regional Directors Regional Media Leaders

FROM: Jim Kurtz - LS/5

SUBJECT: Guidance on Conducting Inspections Following Trespass Law Changes

My staff has recently been apprised of concerns raised by program staff in central office and in the regions concerning their ability to conduct inspections on private property without being issued a citation for trespass. The concerns apparently stem from recent publicity about changes to the trespass law which became effective on July 11, 1996 and press accounts about a county zoning administrator who was cited for trespass after inspecting private property for compliance with the county's zoning ordinance for junkyards.

Attached is a memorandum providing additional background about those concerns, the changes to the trespass law and the relationship between those changes and the specific statutory authority for Department staff to conduct inspections in various program areas. Based on the attached analysis, please advise your staff who conduct inspections pursuant to statutory authority to use the following guidelines in conducting those inspections.

Department staff who conduct inspections on private property pursuant to specific statutory authority should carry a copy of the statutory provisions with them in the event their authority to conduct inspections on private property is challenged by the owner or occupant of the property inspected.

In most instances, Department inspections can and should be conducted after notifying the property owner or occupant (and explicitly or implicitly securing his or her consent to the inspection).

If the inspection has not been scheduled in advance with the consent of the property owner or occupant, Department staff should attempt to identify the owner or occupant of the property to be inspected in advance of., or upon arrival at, the property and obtain the consent of property owner or occupant to conduct an inspection. (Showing the property owner or occupant a copy of the statutory authority for the Department to conduct the inspection will usually result in consent being given to enter and inspect the property.)

If consent to enter the property is refused, Department staff should seek a special inspection warrant under ss. 66.122 and 66.1 23, Wis. Stats., to inspect the property. Procedures for obtaining a special inspection warrant are outlined in Manual Code 4191.5.

If, during the course of conducting an inspection, the property owner or occupant notifies the Department staff that he or she is withdrawing consent to remain on the property, Department staff should leave the premises as requested. If further inspection of the property is required, Department staff should seek a special inspection warrant under ss. 66.1 22 and 66.123, Wis. Stats., for conducting the remainder of the inspection

In the event that the property owner or occupant cannot be located or cannot be contacted to provide consent, Department staff should consult with their supervisors and program attorney to determine whether and under what conditions an inspection may be conducted.

Following these guidelines should minimize any potential conflicts associated with the Department staff

conducting authorized inspections, in light of the "new" trespass law. If there are additional questions about this guidance, please have your staff contact their respective Bureau of Legal Services program attorney for assistance.

Attachment

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: October 29, 1997 FILE REF: 8300

TO: Jim Kurtz - LS/5

FROM: Tom Steidl - LS/5

SUBJECT: Proposed Guidance on Inspections

Recently, Department staff have raised concerns about their authority to conduct inspections of private property in light of changes to the trespass law (s. 943.13, Wis. Stats.) and the publicity associated with a case in which a county zoning administrator was cited for violating the "new" trespass law. The purpose of this memo is to provide general guidance to Department staff who conduct inspections as part of their program responsibilities, in light of the changes to the trespass law. [NOTE: This guidance does not apply to or address the authority of conservation wardens to enter private property in carrying out their law enforcement responsibilities, but it is intended to apply to other (noncredentialed) DNR staff.]

Changes to the Trespass Law

The changes to the trespass law which have been the focus of Department staff's concerns became effective on July 11, 1996 with the enactment of 1995 Wisconsin Act 451. The pertinent provisions of the trespass law, as affected by the 1995 act, [relevant excerpts of the trespass law, as amended, are attached] include:

- A trespass violation occurs **whenever anyone enters certain, specific types of land** (enclosed, cultivated or undeveloped land or land occupied by a structure used for agricultural purposes) **without the expressed or implied consent of the owner or occupant;** it is also a violation if the owner or occupant of such lands gave consent to enter or remain on the lands for a specified purpose or subject to specified conditions and the person who received that consent enters or remains on the land for another purpose of contrary to the specified conditions.

- A trespass violation also occurs **whenever anyone enters or remains on another's land after having been notified by the owner or occupant not to enter or remain on the premises;** notification can occur if the person is notified personally, either orally or in writing or if the land is posted.

There are **only 2 specific statutory exceptions contained within the trespass law** which relate to DNR programs:

- a person entering the land of another, other than a residence or buildings or the curtilage of the residence or buildings, for the purpose of removing a wild animal as authorized under s. 29.59 (2), (3) or (4), Wis. Stats.; and

- a hunter entering land that is required to be open for hunting under **s.** 29.59 (4m) [wild animal removal] or 29.598(7m) [wildlife damage programs], Wis. Stats.

Citation Issued to County Zoning Administrator

Publicity about the changes to the trespass statute occurred when a county zoning administrator received a citation for trespass after going on private land to inspect the property to determine whether the county's junkyard ordinance was being violated. [The citation was subsequently dismissed.] Publicity about the applicability of the trespass law to public employees conducting inspections as part of their job responsibilities has focused attention of DNR staff on the possibility of receiving a citation for violating the trespass law.

Department's Statutory Authority for Inspections/Entry on Private Property

The Department staff have been specifically authorized by statute to conduct inspections and to enter private properties for purposes of conducting inspections for specific programs which the Department administers or oversees. A partial listing of those specific program-related statutory authorities include:

s. 29.05 - fish and game (dead or diseased wild animals)
ss. 31-02(3) and 31.19 - dams and navigable waters
s. 280.13(l)(c) - water supply
s. 281.96 - prevention and abatement of water pollution at industrial establishments
s. 281.97 - sewerage and water systems and sewage or refuse disposal systems
s. 283.55(2) - water pollution discharge permit holders
s. 285.19 - air contaminant sources
ss. 287.93 and 289.91 - solid waste
s. 291.91 (1) and (2) - hazardous waste
s. 292.11(8) - hazardous substance spill
s. 293.86 - metallic mining
s. 295.17(2) - nonmetallic mining

While the scope of the authority granted the Department under these specific statutory provisions varies (based on the specific language of each provision), generally the statutory provisions authorize a department employee to "enter any property" where a regulated entity is located to "inspect" or "investigate" "for the purpose of ascertaining compliance" with a specific program's requirements. Often the specific statute goes on to state that "no person may refuse entry or access to any authorized representative of the department who requests entry for purposes of inspection" or "obstruct, hamper or interfere with any such inspection" [e.g., s. 285.19, Wis. Stats. - air contaminant source inspections]. Some of the provisions contain language which restrict the Department's inspections to "reasonable times" or "reasonable hours."

In addition to these specific statutory authorities for Department staff to conduct inspections on private properties, the Department also has oversight authority over other programs which are administered by local units of government (e.g., floodplain and shoreland programs). The Department's oversight authority generally includes the authority to determine whether the local programs are being complied with and to initiate enforcement actions against violators of the local programs. Such oversight authority implies that the Department staff have authority to inspect private properties to determine whether compliance is occurring. However, as noted below, inspections of private property by Department staff in the course of exercising their program responsibilities should generally be conducted only after notifying the owner or occupant of the private property and obtaining consent to the inspection.

Constitutional Constraints

Although the statutes appear on their face to grant Department staff sufficient authority to enter private property for inspection purposes, both the United States Constitution (Fourth Amendment) and the Wisconsin Constitution (Article 1, Section 11) prohibit "unreasonable searches." Before a government employee can legally conduct an inspection under a statutory inspection authority, the government employee must have: (1) consent of the property owner or occupant; (2) a judicially-issued warrant (in these situations, a special inspection warrant); or (3) a case-law exemption -- for example, a pervasively regulated industry (e.g., firearms or liquor sales) or where there is an emergency that would jeopardize public health or safety or the environment if there is not an immediate inspection.

Impact of "New" Trespass Law on DNR Inspections

The relationship between the "new" trespass law and the Department's authority to conduct inspections under program-specific statutory authority is not entirely clear at this time. What is clear is that:

- the "new" trespass law substantially broadens the actions which constitute a trespass;
- the "new" trespass law has 3 very limited, specific exceptions to actions defined as trespass;
- there is **no** specific statutory exception in the trespass law for entry on private property by public employees for the purpose of performing their official duties or functions (A bill [1 997 Assembly Bill 2001 has been introduced to create such an exception.);
- the changes to the trespass law did not include any specific reference to or revise the specific statutory authorities under which the Department staff conduct inspections.

Until the relationship between the new trespass law and the Department's authority to enter private lands and conduct inspections is clarified (by statutory changes or litigation), the Department is not interested in "testing' the limits of the 'new" trespass law or of directly subjecting Department staff to situations which might result in the issuance of a trespass citation. (Certainly, if in the context of conducting an inspection under specific statutory authority, a Department staff person is cited for a trespass violation, the existence of specific statutory authority would be an affirmative defense to a trespass violation.) In the interim, Department staff should adhere to the following guidelines in conducting inspections.

Guidelines for Conducting Department Inspections on **Private Property**

Although Department staff may be legitimately concerned about the potential of receiving a citation for trespass for conducting inspections on private property, the changes in trespass law are not likely to substantially change the way most DNR staff conduct their inspections. The following guidelines should minimize potential problems:

Department staff who conduct inspections on private property pursuant to specific statutory authority should carry a copy of the statutory provisions with them in the event their authority to conduct inspections on private property is challenged by the owner or occupant of the property inspected.

In most instances, Department inspections can and should be conducted after notifying the property owner or occupant (and explicitly or implicitly securing his or her consent to the inspection).

If the inspection has not been scheduled in advance with the consent of the property owner or occupant, Department staff should attempt to identify the owner or occupant of the property to be inspected in advance of, or upon arrival at, the property and obtain the consent of property owner or occupant to conduct an inspection. (Showing the property owner or occupant a copy of the statutory authority for the Department to conduct the inspection will usually result in consent being given to enter and inspect the property.)

If consent to enter the property is refused, Department staff should seek a special inspection warrant under ss. 66.122 and 66.1 23, Wis. Stats., to inspect the property. Procedures for obtaining a special inspection warrant are outlined in Manual Code 4191.5.

If, during the course of conducting an inspection, the property owner or occupant notifies the Department staff that he or she is withdrawing consent to remain on the property, Department staff should leave the premises as requested. If further inspection of the property is required, Department staff should seek a special inspection warrant under ss. 66.1 22 and 66.123, Wis. Stats., for conducting the remainder of the inspection

In the event that the property owner or occupant cannot be located or cannot be contacted to provide consent, Department staff should consult with their supervisors and program attorney to determine whether and under what conditions an inspection may be conducted.

In addition, if the Department issues permits, licenses or approvals which may entail the Department staff conducting an inspection of the property to determine whether the permit, license or approval should be issued or whether the conditions of approval are complied with, the application forms for the permits, approvals or licenses should be modified to include a specific 'consent' by the applicant to Department to conduct inspections of the property. In the interim, Department staff should follow the preceding guidelines for conducting site inspections on private properties which are subject to Department permits, licenses or approvals.

Following these guidelines should minimize any potential conflicts associated with the Department staff conducting authorized inspections, in light of the "new" trespass law. If there are additional questions about this

guidance or questions about the interrelationship of DNR inspection authority and the 'new" trespass law in specific circumstances, DNR program staff should contact their supervisor and Bureau of Legal Services program attorneys for assistance.

Attachment

EXCERPTS FROM THE 'NEW' TRESPASS LAW

943.13 Trespass to land. (1e) In this section:

*****

(az) **"Implied consent"** means conduct or words or both that imply that an owner or occupant of land has given consent to another person to enter the land.

*****

(e) **"Private property"** means real property that is not owned by the United States, this state or a local governmental unit.

(f) **"Undeveloped land'** means land that meets all of the following criteria:

1. The land is not occupied by a structure or improvement being used or occupied as a dwelling unit.
2. The land is not part of the curtilage, or is not lying in the immediate vicinity. of a structure or improvement being used or occupied as a dwelling unit.
3. The land is not occupied by a public building.
4. The land is not occupied by a place of employment.

(1 m) Whoever does any of the following is subject to a Class B Forfeiture [The penalty for a Class B forfeiture is a forfeiture not to exceed $1,000]:

(a) **Enters any enclosed, cultivated or undeveloped land of another,** other than undeveloped land specified in par. (e) or (f), **without the express or implied consent of the owner or occupant.**

(am) **Enters any land of another that is occupied by a structure used for agricultural purposes without the express or implied consent of the owner or occupant.**

(b) **Enters or remains on any land of another after having been notified by the owner or occupant not to enter or remain on the premises.**

*****

(1 s) **In determining whether a person has implied consent to enter the land of another** a trier of fact shall **consider all of the circumstances existing at the time the person entered the land, including all of the following:**

(a) **Whether the owner or occupant acquiesced to previous entries by the person or by other persons under similar circumstances.**

(b) The customary use, if any, of the land by other persons.

(c) **Whether the owner or occupant represented to the public that the land may be entered for particular purposes.**

(d) The general arrangement or design of any improvements or structures on the land.

(2) **A person has received notice from the owner or occupant** within the meaning of sub. (1 m)(b), (e) or (f) **if he or she has been notified personally, either orally or** in **writing** or **if the land is posted.** Land is considered to be posted under this subsection under either of the following procedures:

*****

(3m) **An owner or occupant may give express consent to enter or remain on the land for a specified purpose or subject to specified conditions and it is a violation of sub. (1 m)(a) or (am) for a person who received that consent to enter or remain on the land for another purpose or contrary to the specified conditions.**

*****

(4m) This section does not apply to any of the following:

(a) A person entering the land, other than the residence or other buildings or the curtilage of the residence or other building, of another for the purpose of removing a wild animal as authorized under s. 29.59(2), (3) or (4).

(b) A hunter entering land that is required to be open for hunting under s. 29.59(4m) or 29.598(7m).

*****

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: November 27, 2000

TO: WMS's

FROM: Linda Van Pay, NER
Elly Lawry, FH/3

SUBJECT: Permit Fee Refunds
Insert into Chapter 10 of the Water Regulation Guidebook

A reminder to Water Management Specialists, NR 300.06(4) Wis. Adm. Code, requires the department to refund the permit fee if:

1) the applicant withdraws the application before the department determines the application is complete; **or**

2) if the department fails to make a determination within the time limits specified in s. NR 300.04 for activities regulated under ss. 30.10 to 30.205, 30.21 to 30.27 or 281.22 Stats. **or**

3) for supplemental permit fees (expedited permits) under NR 300.06(3), if the department fails to make a decision on a complete application within the time limit requested.

This applies to only complete applications received on or after September 1st, 2000. Complete applications for activities regulated under s. 30.206, 31.02 to 31.38 or for after-the-fact permits <u>are not</u> eligible for refunds. (See NR 300 for the specific language).

Refund Procedure for Returning Fees Submitted with Chapter 30 Applications

1. Make a copy of withdrawal (dismissal) letter that includes reason a refund should be given to applicant.

2. Copy the General Remittance Sheet (Form 9300-29A) that was originally submitted with the fee to be refunded.

3. Copy typed sheet that was originally submitted with General Remittance Sheet showing the docket #, applicant, address and amount of fee submitted. Example:

   John Doe $300.00
   1111 Pleasant Street
   Anywhere, USA 11111
   Check from: Address of consultant or person that submitted fee other than applicant.
   3-NE-00-0001

4. Highlight pertinent information on withdrawal letter and typed sheet to show information needed for refund.

5. Submit the above THREE sheets to your Regional Finance person who will enter the codes and information into Wismart.

6. A refund check is sent directly from Madison to the applicant/consultant that originally submitted the fee. The refund may take 3-4 weeks to process.

CORRESPONDENCE/MEMORANDUM

DATE: December 21, 2001

Insert: CHAPTER 10
Waterway and Wetland Handbook

TO: Water Management Specialists
Water Management Engineers
Regional Aquatic Habitat Experts
Bureau of Fisheries Management and Habitat
Protection – Rivers and Habitat Protection Section

FROM: Mary Ellen Vollbrecht, Chief
Rivers and Habitat Protection Section

SUBJECT: Guidance on Reviewing Chapter 30 Permit Applications for Completeness

In the 2001-2003 budget bill, Chapter 30 was amended to require specific time limits for the Department to determine if a permit application is complete, and for scheduling public hearings for some chapter 30 activities. This guidance explains the new statutory requirements, and outlines the steps for staff to follow to be consistent with the new statutory language requiring review for completeness.

Section 30.015, Wis. Stats., requires the following:

- The Department must provide a notice of the permit application completeness or incompleteness to the applicant within 60 calendar days from receipt of their application, for applications filed pursuant to sections 30.10 to 30.27, Stats.;
- The notice of incompleteness must specify the informational items necessary to complete the application;
- Department staff may not request additional informational items which were not originally identified in the notice, unless staff and the applicant agree or the applicant makes material additions or alterations to the project;
- If a notice of incompleteness is not provided to the applicant within 60 days, the applicant may refuse to provide additional information and Department staff will have to make the permit decision based upon the information originally submitted.

To meet these statutory requirements, Water Management Specialists should complete the following steps with each new chapter 30 permit application:

Step 1. Record Date of Receipt
All permit applications should be marked or stamped with the date of receipt.

Step 2. Review for Completeness
Water Management Specialists should review the permit application for completeness as soon as possible, or within 55 days of receipt. If the permit application is complete, a notice that the permit application is complete should be sent to the applicant (proceed to Step 3).

If the permit application is incomplete, staff should develop a list of informational items necessary for the Department to complete their permit review. The informational items should be essential to determine if the project will meet the legal standards in statute and administrative code. It may be necessary to discuss the application with your field biologists or engineer to determine information needs. A number of *Information Checklists* have been developed to assist staff in identifying the information that will be required to complete the application.

Section 30.015, Stats., prohibits staff from requiring items of information that are not specified in the initial Notice of Incomplete Application letter. This letter is the only opportunity Department staff have to request additional information, so be thorough. You may initially ask for a list of required items, and later waive some of those items if you conclude that you can reach a permit decision without all the information that was initially requested in the notice.

Step 3. Provide Notice to Applicant

Within 60 days from receipt of the permit application, Water Management Specialists are required to provide notice to the applicant that the permit is complete or incomplete. Staff should send one of the following letters:

A. *Notice of Complete Application*: If the permit application is complete, a letter providing notice that the permit application is complete should be sent to the applicant. A new letter template titled *Notice of Complete Application* has been added to the FH Permits Database documents.

B. *Notice of Incomplete Application*: If the permit application is incomplete, a letter providing notice that the permit application is incomplete should be sent to the applicant. A new letter template titled *Notice of Incomplete Application* has been added to the FH Permits Database documents. This template document includes the following checklists:

- General Permit Information
- Work Plan Sequence Information
- Erosion Control Plan Information
- Material Management Plan Information
- Dewatering Plan Information
- Wetland Information

The checklists can currently be used in two ways. First, you can check the box next to each applicable item of information that is necessary, print the checklist page(s) and attach them to the Notice of Incomplete Application letter. Second, you can cut-and-paste specific items from the checklists and insert them into the Notice of Incomplete Application letter. A third method is under development, which will provide a set of "tabs" in the FH Permits Database from which to choose the missing items, and have the database system automatically insert them into the Notice of Incomplete Application letter. Checklists for Nonmetallic Mining and for Engineering Hydrology and Hydraulics requirements are also under development, and will be added to the FH Permits Database documents when they are completed.

Again, this Notice of Completeness/Incompleteness requirement applies to permit applications filed pursuant to section 30.10-30.27, Stats. Applications filed pursuant to sections 31.02 to 31.38 (dams, water levels, etc.), 281.22 (federal wetland water quality certification), 281.36 (wetland mitigation) and 281.37 (nonfederal wetland water quality certification), Stats. should be reviewed following the timelines in NR 300, Admin. Code. See the attached table for applicable timelines for each project type.

For enforcement situations, NR 300 indicates that time limits are not applicable when the department has determined, due to an impending enforcement action, that it will not process after-the-fact (ATF) permit or approval applications. NR 301.04(1) provides that the department may either suspend or continue processing ATF applications. If you determine to not process an ATF application until enforcement action is complete, document this determination for the file, and the time limits for Notice of Completeness/Incompleteness will be suspended. If you determine to continue processing an ATF application, then the 60-day time limits apply.

Permit fees should continue to be handled pursuant to section 30.28, Stats. and NR 300, Admin. Code.

Attachment: "Time Limits for Permits, Approvals and Determinations" table

Approved: Aquatic Habitat Coordinators, at October 22, 2001 FH Board Meeting

Approved: _____ on 12-21-01
Michael Cain, Legal Services *Date*

Approved: _____ on 12-21-01
Mary Ellen Vollbrecht, Section Chief *Date*

TIME LIMITS FOR PERMITS, APPROVALS AND DETERMINATIONS

Action	**Applications filed pursuant to ss. 30.10 to 30.27**	**Applications filed pursuant to ss. 31.02 to 31.38**	**Applications filed pursuant to s. 281.22 (federal wetlands)**	**Applications filed pursuant to s. 281.36 (wetland mitigation)**	**Applications filed pursuant to s. 281.37 (nonfederal wetlands)**	**Expedited Permits (20 business days to accept request for expedited)**
Review and send completeness notice or send one time comprehensive information request	60 calendar days	N/A	N/A	N/A	30 calendar days	**60** calendar days for permits issued under ss. 30.10 to 30.27 **30** calendar days for permits issued under s. 281.37
Review for completeness and inform applicant **(no limit on requesting additional information)**	N/A	30 calendar days	30 calendar days	30 calendar days	N/A	30 calendar days for permits issued under ss. 31.02 to 31.38. 281.22 and 281.36.
Make a final determination once application is complete	120 calendar days	120 calendar days	120 calendar days	120 calendar days or **60 working days** if the wetland is less than one acre in size, not located in a floodplain and does not involve the issuance of a permit or other approval under ch. 30.	120 calendar days	Negotiated with applicant but shorter than 120 calendar days
Artificial wetland determination under NR 103	N/A	N/A	15 working days	N/A	15 working days	N/A

If the Department determines that an EA is required, the time limits for making a final decision on a complete application shall be increased by 60 working days.

The time limits for making final determinations on completed applications do not include the number of days between November 1 of any calendar year and April 1 of the succeeding calendar year for applications received after October 1 if a field investigation is required before the department has adequate information to make a decision.

Note: This table was prepared as an attachment to the December 21, 2001 memo "Guidance on Reviewing Chapter 30 Permit Applications for Completeness".

CORRESPONDENCE/MEMORANDUM

DATE: November 30, 2001

TO: Water Management Team

FROM: Susan Sylvester - AD/2

SUBJECT: Permits and Approvals for New Power Plants

Background

The purpose of this memo is to provide information and establish responsibilities for WPDES permits, chapter 30 permits, other approvals and associated actions for new power plants proposed in the state.[1] A memo from the Secretary (latest draft attached) describes the process at the Department level and directs the preparation of this guidance.

Section 196.491, Stats., establishes the process for the review and approval of permits for power plant projects. These statutory provisions override other provisions in state law governing the WPDES and other permit programs. However, the current practice involves many water program staff in the Regions and the Central Office, creating confusion on the part of the project developer, and significant redundancy in our reviews and comments on projects. Establishing a clear process is necessary to assure the Water Program is responsive to project developers who apply for a permit to construct a power plant in Wisconsin. This process is being created to conform to the directions provided by the Secretary that establishes the Department process for the review of power plants.

Under the current statutory operating procedures, the project developer (or their consultant) submits an engineering plan to the Department for a determination of the permits and approvals that would be required for the construction or operation of the facility. The Department has 30 days to respond to this submittal. Following that response, the developer submits permit applications that require Department action within specified time periods.

Process

We will implement the following process to assure we carefully, promptly and thoroughly make decisions on these projects in conformance with the statutory requirements that apply:

1. Engineering plan review – As directed in the Department's review process, the Section Chiefs of the Rivers and Habitat Section, the Private Systems Section and the Wastewater Permits and Pretreatment Section will be responsible for reviewing and providing response to the engineering plan submitted by the project developer. As necessary, these Section Chiefs (or their designee) will consult with ppropriate Regional water program staff regarding the identification of permits and approvals that will be needed for the project. The response to the engineering plan submittal will be sent to the Chief of the Environmental Analysis and Liaison Section from the individual Section Chiefs completing the

[1] A separate draft guidance document has been issued (dated October 3, 2001) for water withdrawals and water loss review and approvals under s. 281.35, Stats., and NR 142.

review.[2]

2. Water Program Project Coordination – Because many of the permits and approvals for power plant projects will be issued by the Regions, it is important that there be a cross-program regional lead person to assure an effective and coordinated Regional review of projects. Therefore, the Region in which a particular project is to be located should assign an overall "water project manager" for each of these projects.[3] This person should be in the lead as the primary contact for the facility regarding water-related permits and approvals. This could be the GMU leader, a sub-team leader or a staff person with the GMU or whomever the Region assigns to function in this role. This project manager would then be responsible to **assure there is coordination of all regional water program staff who are responsible for regulatory permits and/or approvals** (e.g., WPDES, stormwater, WQBELs, chapter 30, s. 281.35 water loss, etc.). Coordination means ensuring data sharing among water permit reviewers, consolidating data requests, efficient division of labor on data analysis and field work, and resolution of any differences in data interpretation or policy conflicts. This water project manager will also coordinate the water program's involvement in the WEPA process through consultation with the Regional project coordinator (see Secretary's memo). A copy of the request for review of the engineering plan memo that is prepared by the Chief of the EAL Section and a copy of the engineering plan will be sent to the Water Media Leader in the Region where the proposed facility is to be constructed. This memo will initiate the formal action to assign a "water project manager" in the Region. The Water Media leader in the Region will inform the Section Chiefs identified in item 1, above, of the person assigned as the water project manager.

3. WPDES Process Water Permits – Based on the review of the engineering plan, the **Section Chief of the Wastewater Permits and Pretreatment Section and the Region's project manager will jointly agree on whether the initial WPDES permits for wastewater discharges will be issued in the Central Office or in the Region**. In addition, at this time, assignments for issuance of permit coverage for stormwater, construction sites, or other general permits will be made. If the noted Section Chief and Regional project manager cannot reach agreement on the assignment of permit issuance responsibility for the wastewater discharges, the dispute will be resolved through the chain of command, with the Division Administrator as the final decision-maker. This decision will be based on factors that include: size and complexity of the project, current workload of permits staff in the central office and the regions, experience of respective staff in the regions, relationship between the WPDES permit and the other permits that may be issued by the Region, etc. The permit drafter, whether in the central office or in the region, will work with the regional project manager to issue the permit and associated approvals within the time frames established in s. 196.491, Stats. Permit sign-off will follow protocols for all other WPDES permits issued in the central office or in the Regions.

4. Other WPDES permits – The construction site and industrial stormwater general permits and any other non-process WPDES permits will be issued by the Region.

5. High Capacity Well and other DG Approvals – If the proposal involves the construction of a high capacity well, the review and approval of that well will occur in the Bureau of Drinking Water and Groundwater. If other water supply approvals are needed, they will also be reviewed and approved by the Bureau in consultation, as necessary, with the Region. If a water loss approval under s. 281.35,

[2] This response may contain reference to generic guidance or other documents that relate to specific program elements.

[3] Simple cycle power plants needing only limited quantities of water or plants using municipal water supply and treatment will normally not warrant this level of management.

Stats., is needed, these approvals will be coordinated with the Region (see item 7).

6. Waterway and wetland permits and approvals (i.e., ch. 30, etc.) will be issued by Regional staff. If the application necessitates practicable alternative analysis, significant adverse impact to wetland function, or diversions (water rights determinations), consult bureau staff before determining application completeness. Bureau staff is also available for assistance with complex jurisdictional determinations, instream flow analyses, other advanced analysis methods, and policy issues that are not addressed in the handbook.

7. Water Withdrawal and Water Loss Review and Approval – This review and approval will occur within the GMU team at the Region, under the direction of the Regional water project manager. If the water withdrawal/loss involves a high capacity well approval, the Region will undertake this review in consultation with the Bureau of Drinking Water and Groundwater. Separate guidance is available regarding this process.

Discussion

A significant number of decisions associated with project direction for an individual proposal are made during project review at the conceptual stage or during the review of the engineering plan. Much of the subsequent activity associated with the development of permits will be dependent on information supplied at that time. Because of the timelines established in statutes, it is important that communication with the developer be often and direct – including statement of likely outcomes, to assure the efficient use of time in drafting the permits and approvals once the applications are received.

It should be noted that the addition of these projects into the permitting process may increase the backlog of other permits and conflict with other statutory deadlines, including some WPDES permits and waterway and wetland permits. For WPDES permits, the statutory deadlines associated with power plant projects are more restrictive than those associated with the reissuance of existing permits, and so a higher priority will be assigned to these power plant projects. Where competing statutory deadlines for waterway or wetland decisions cause conflicts, consider the consequence of the specific deadline. Generally, power plant application review for completeness will take priority, followed by review for completeness for other applications – the consequence of missing completeness determination deadlines is that information needed for decisions cannot be obtained. In terms of decisions, power plants are top priority because of the consequences on other agency decisions, followed by expedited decisions because of the revenue impact of missing a deadline.

cc: Duane Schuettpelz – WT/2
Lee Boushon – DG/2
Mark Putra – DG/2
Mary Ellen Vollbrecht – FH/2
Energy Workgroup

c:\data\power plant assign.doc

State of Wisconsin

CORRESPONDENCE/MEMORANDUM

DATE: November 21, 2001 **DRAFT**

TO: Department Leadership Team

FROM: Darrell Bazzell – AD/5

SUBJECT: Department Review of Power Plants

The purpose of this memo is to advise you of the overall process we will be using to review proposed electric power generation facilities. I place a very high priority on positioning the Department to be an effective partner in providing for Wisconsin's future energy needs in an environmentally sensitive and cost effective manner. This is consistent with the role assigned to us by the Legislature and envisioned in the Governor's Energy Strategy.

The approach described below was developed by the recently established Energy Work Group. I charged that group, in part, with the task of developing recommendations for how we position ourselves to fulfill the Department's important review responsibilities for power plant projects. The group will also be looking at how we should deal with other types of energy-related projects and a variety of broader energy-related policy matters.

There are parallel needs for a better definition of roles and responsibilities within the permit review programs, particularly between the central office and the regions. By copy of this memo I'm asking the bureaus in the Water, the Air & Waste and the Land Divisions that are involved in power plant reviews to assess their processes for responding to the tight statutory timelines applicable to these reviews and to develop any program-specific guidance that's needed to assure we deal with power plant work in a timely fashion.

Statutory Timelines and Agency Responsibilities

As depicted in Attachment #1, the Power Plant Siting Law (s. 196.491 (3), Wis. Stats.) establishes a tight schedule for reviewing large (100 Megawatts or more) electric generation facilities by both the Public Service Commission (PSC) and the Department. The formal process begins with the Department's review of an Engineering Plan to identify the Department regulatory requirements for the facility. This Plan must be submitted at least 60 days before the filing of an application with the PSC. Our review of the Engineering Plan must be completed within 30 days of the date of receipt by the Department. The project proponent then has 20 days to submit applications for the permits and approvals we've identified in our review of the Engineering Plan. The Department then has 30 days to determine whether the applications are complete. In making the application completeness determinations, the Department also considers whether it has enough information to do an adequate WEPA review and shares those conclusions with the PSC. Once the Department finds the applications to be complete, we have 120 days to make our regulatory decisions.

The project proponent must also file an application for a Certificate of Public Convenience and Necessity (CPCN) with the PSC. Significantly, the PSC has only 180 days from finding that an application is complete to make a final determination on whether to approve the project.

Within this time frame, the PSC (generally with the Department as a cooperating agency) must complete the WEPA process (typically a Draft and a Final EIS), hold a public hearing on the CPCN application, and act on the application at a regular meeting of the Commissioners.

Under the Siting Law, the PSC cannot finalize its decision on the CPCN application until DNR permits needed to construct the facility are issued. Other statutes provide that the construction permit for a new air pollution source is needed before construction (including site preparation) can begin. In addition, other permits for alterations of navigable waters, high capacity wells, wastewater discharge, solid waste disposal, etc. must have been issued before construction or operation of those specific facilities may commence.

The present statutory situation puts considerable pressure on the Department to accelerate our review of proposed power generation facilities. For example, if lack of data to support our evaluations of air, water, solid waste or habitat-related impacts, including endangered resource issues, were to prevent the Department from being able to complete its WEPA or regulatory responsibilities, we could be cast as the primary cause of delay in PSC's efforts to meet its schedule requirements under the Siting Law. Therefore, it's important that the Department demonstrate a commitment and capability to fulfill its responsibilities under the Siting Law and to help the PSC meet its statutory review deadlines.

Organizing to Meet Power Plant Siting Law Requirements

At the DLT level, the Administrator of the Air & Waste Division is assigned responsibility for overseeing implementation of the procedures outlined in this memo. A conceptual framework for these procedures is presented in Attachment #2. The related responsibilities include: 1) resolving issues regarding the priority of a particular power plant project relative to the other work assignments of project team members; 2) resolving legal, technical and policy questions arising out of the Department's review of proposed power plants; 3) developing an intra-net based system for tracking the status of each project vis-à-vis applicable Siting Law deadlines; 4) developing a system of performance measures for monitoring the implementation of the procedures in this memo; and 4) communicating with counterpart administrators at the PSC to assure the provisions of the PSC/DNR Cooperative Agreement on WEPA procedures (Attachment #3) are followed.

The Environmental Analysis and Liaison (EAL) Section in the Bureau of Integrated Science Services is responsible for coordinating the review of Engineering Plans for proposed power plants. Engineering plans received by agency staff should be forwarded immediately to the EAL Section Chief given the 30 day review deadline in the Siting law. The EAL Section Chief will work with the Regional Environmental Analysis Supervisor and the programmatic contacts listed in Attachment #2 who appear to be affected by the particular project. Department employees receiving an initial contact from a prospective power plant applicant should advise the developer to contact the EAL Section Chief regarding the process, information and review issues likely to affect the project. EAL Section staff will ensure that the potential applicant is aware of all available guidance relating to the Department's overall information requirements including relevant pages on the Department's Web Site.

If possible, EAL staff will arrange an early (pre-Engineering Plan filing) meeting between the prospective applicant, the assigned contacts from the involved Department programs, and the PSC to discuss the project. Once an Engineering Plan is received, EAL staff will coordinate the Department review within the 30-day statutory deadline. This review, which is at a general and typically conceptual level, will be the responsibility of the programmatic contacts. Input from appropriate regional staff will also be solicited . The assigned EAL staff member will send an email copy of the Engineering Plan review memo to the Administrators of the Divisions that are likely to be involved in the review of the project.

Upon becoming aware of a proposed power plant project for which the applicant has or is likely to submit an Engineering Plan, the EAL Section Chief will consult with the appropriate Division Administrators and Regional Director (or designee) to designate a project manager for the purposes of Manual Code 1506.1. These appointments may go to either central office or regional staff on a case-by-case basis. For those projects already in the process, the Project Manager will be designated within 30 days of the date of this memo. A listing of these projects is presented in Attachment #4.

After their appointment, which will be documented in the Department's review letter on the Engineering Plan (or sooner in the process, if practicable), Project Managers will work with the EAL Section Chief, Regional Director (or designee) and the program contact persons to determine the composition of the project review team. This team of central office and regional staff will be responsible for contributing to the WEPA document and process and issuing all needed permits. The composition of the project review team will be confirmed as soon as practicable in a memo signed by the Administrators of the participating Divisions.

The responsibilities of the Project Manager include: 1) facilitating contacts with the applicant and consultants, the Public Service Commission and other agencies likely to be involved;
2) serving as the first point of contact for the public and the press with interest in the project; 3) coordinating the internal review of the permit applications and the Department's role in the WEPA process per the PSC/DNR Cooperative Agreement; 4) assuring the DNR's intranet-based tracking system contains current information about the status of each project vis-à-vis applicable Siting Law deadlines; and 5) monitoring progress on the project and consulting with the Administrators of the Water, Air & Waste and Land Divisions as necessary to ensure an appropriate effort is made to meet Siting Law deadlines. If the Department will be adopting the PSC's WEPA document for the project, the Project Manager will ensure appropriate participation as required by NR 150.20, Wis. Adm. Code.

The affected Region will designate a Regional Coordinator for the project. This would typically be staff from the Environmental Analysis program or another person in a logical position to facilitate interdisciplinary review of the project. When warranted by workload and other related considerations, the Project Manager and Regional Coordinator may be the same person. If necessary [4], the participating Water Division programs will designate a lead representative from the region to coordinate their review responsibilities.

The Regional Coordinator will be responsible for ensuring there is appropriate, timely and accurate regional input regarding the project. The Regional Coordinator should keep the Project Manager, Water Program Lead (if appointed), Regional Management and management of affected programs apprised of any issues or concerns that arise at the region, and work to address them. Such issues could relate to the review of permits that are being processed in the region or the region's input into the WEPA process. The name of the Regional Coordinator will be documented in the Department's review letter on the Engineering Plan (or sooner in the process if practicable).

The Project Manager will meet with the Regional Coordinator, Water Program Lead (if appointed) and PSC staff as soon as practicable to discuss respective responsibilities, review schedules, information needs and other items of mutual interest. The Project Manager will consult with the Bureau of Legal Services early in the project review process in order to establish mutual agreement on the timing and extent of that program's involvement. This should include preliminary discussions as to which Department staff may be called upon to provide testimony at Department, PSC, and/or joint hearings on the project (including WEPA documents and any of the permits).

The Project Manager will strive to establish and maintain effective communication between the Department, the PSC, and all affected outside parties. This will include ensuring that staff assignments, information needs, timing and other factors are clearly understood by all participants. The Project Manager will keep the EAL Section Chief and the Air & Waste Administrator informed of critical developments affecting the timing and scope of the Department's review. The Air & Waste Administrator will work with other affected Administrators and the Regional Director as appropriate to address any issues or concerns needing their attention. To facilitate the necessary communication efforts, the EAL Section Chief will pursue ways to enhance our ability to monitor the status of multiple power plant reviews and identify and address critical path issues relating to permit reviews or compliance with WEPA.

[4] Simple cycle power plants needing only limited quantities of water or plants using municipal water supply and treatment will normally not warrant this level of management.

Next Steps

The Energy Work Group is also developing a strategy and action plan for implementing non-statutory solutions to the timing challenges inherent in the Siting Law. The objective is to direct an outreach effort towards potential power plant applicants to inform them of the overall regulatory framework and information requirements likely to be applicable to their project. Attachment #5 to this memo is the current draft of what's being called the "Proactive Strategy" for facilitating the issuance of all DNR permits within the Siting Law deadlines. I'm very pleased with this strategy and see its development and implementation as an excellent opportunity for the PSC, utilities and other power plant developers, environmental organizations and the public to work together in providing for Wisconsin's energy needs.

I appreciate the commitment of all Department regulatory programs to periodically review their permit processes relating to power plants in order to identify and remove any barriers to completion of their permit reviews within the Siting Law deadlines. If you have any questions about this memo or its implications for a project that you are involved in, please contact Jay Hochmuth at 608-267-9521 or George Albright at 608-266-6437.

CC: Avie Bie – PSC Chairperson
Robert Norcross – Administrator, PSC Electric Division
Lloyd Eagan – AM/7
Mike Staggs – FH
Jim Kurtz – LC/5
Energy Work Group
Regional EA Supervisors

ATTACHMENT 1

SCHEDULE OF STATUTORY EVENTS FOR REVIEWING POWER PLANTS UNDER S. 196.491, WIS. STATS.[5]

Day 0 – Engineering Plan received by DNR

Day 30 – DNR response to Engineering Plan regarding permits and approvals required

Day 50 – Project proponent submits applications for DNR permits
Day 60 – Project proponent submits CPCN application to PSC

Day 80 – DNR makes determination of application(s) completeness
Day 90 – PSC makes determination of CPCN application completeness

[DNR and PSC review permit applications, prepare WEPA document, hold public hearings]

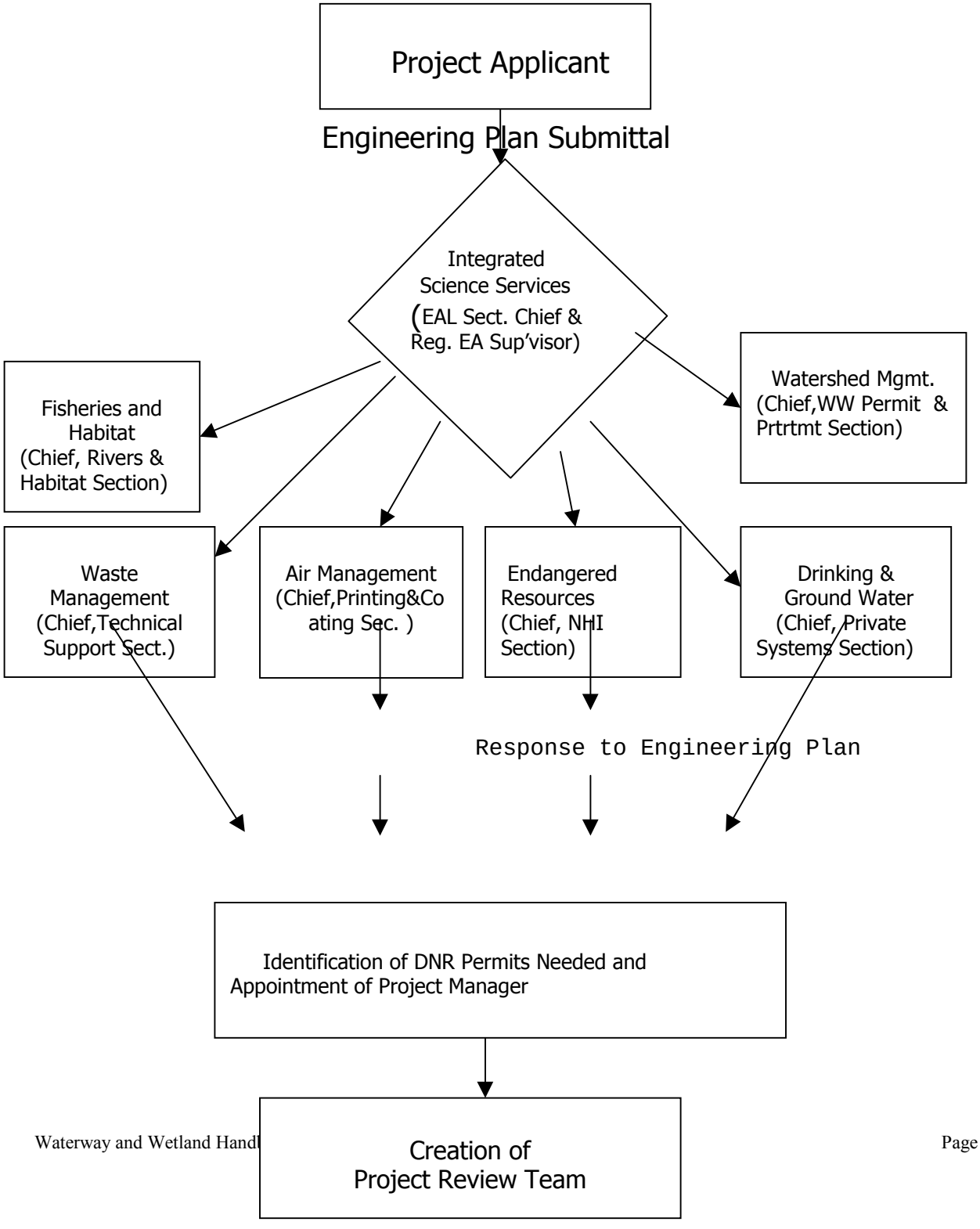
Day 200 – DNR makes decisions on permits needed for construction of the facility

Day 270 – PSC makes decision on CPCN
Day 271 – Project proponent may commence construction

[5] Assumes all applications are complete upon submittal

ATTACHMENT 2

Conceptual Framework for Reviewing New Power Plants



ATTACHMENT 3

Cooperative Agreement Between the Public Service Commission and the Department of Natural Resources For WEPA Document Preparation and Review

I. Purpose and Scope

The Public Service Commission (PSC) and the Department of Natural Resources (DNR) are both involved in making regulatory decisions regarding several categories of energy-related projects. The majority of these projects are electric generation facilities. The PSC and the DNR are also responsible for complying with the Wisconsin Environmental Policy Act (WEPA) in the course of making their respective regulatory decisions. The intent of this agreement is to maximize the efficiency and effectiveness of the agencies' environmental review processes while recognizing the different authorities, expertise, and needs of each agency. This agreement also embodies a mutual commitment to meet the statutory timelines for electric generation projects established in 1998 Wisconsin Act 204.

This agreement applies to projects where both agencies have critical regulatory authority as recognized by Wis. Stat. § 196.491, or where sensitive resources could be significantly affected by the proposed project including any ancillary facilities. Critical approvals are those that are necessary for the applicant to begin construction of the facility or to put it in operation. Examples of such approvals include a certificate of public convenience and necessity (CPCN), an air pollution source permit, and a process wastewater discharge permit.

This agreement supersedes the April 1978 Cooperative Agreement and remains in effect until amended or rescinded by the mutual concurrence of the Chairperson of the PSC and the Secretary of the DNR. The PSC WEPA Coordinator and the DNR Chief of the Environmental Analysis and Liaison Section will be responsible for overseeing their respective agency's implementation of this agreement.

II. Decisions regarding the WEPA process

Each agency will make its own decision about what level of environmental review is appropriate for compliance with WEPA. These determinations will be based on considerations such as: 1) existing administrative rules; 2) the extent of the agencies' authority over the project; 3) the type of technology proposed (including ancillary facilities); and 4) site characteristics for the proposed project and the ancillary facilities.

In some cases, these WEPA process decisions may result in each agency conducting a different process or level of review. Both agencies may decide to prepare an Environmental Impact Statement (EIS), both may prepare an Environmental Assessment (EA), one may prepare an EA and the other an EIS, or one agency may decide not to prepare any WEPA document at all. A brief discussion of each option is outlined below.

1) When both agencies determine that preparation of a joint EIS is warranted for a major electric generation project, the PSC shall assume the role of lead agency since it has the broadest decision responsibility. For review purposes, a power plant project includes the generation facility as well as sites and routes for ancillary facilities, such as transmission interconnections, fuel supply lines, wells, and water intake and discharge pipes.

DNR shall consider whether to jointly prepare the EIS, or to adopt the PSC document. Appropriate participation and technical assistance by DNR staff shall be determined by consultation between the agencies.

2) If both agencies determine that an EA is needed, they may jointly prepare it with responsibilities for content similar to those for an EIS.

3) If only one agency prepares an EIS or EA, the other agency shall provide information related to aspects of the project that are under its authority. This information sharing may include review and comment on the EIS or EA and participation in the hearing process of the preparing agency.

III. Procedures for joint preparation of an EIS or EA

When a joint WEPA document is prepared, the DNR and PSC will coordinate their environmental and regulatory review of the subject projects to the extent allowed by their separate authorities, and within the constraints of the normal timing of the submittal and review of necessary permits and approvals.

Upon initial contact by a potential applicant or filing of an Engineering Plan with DNR, the DNR project manager and the PSC WEPA coordinator will exchange information and commence a discussion of their respective WEPA document decisions.

Each agency shall designate an employee who has the following responsibilities for each specific project:

1) coordinate that agency's participation in the review of the project.
2) expedite the exchange of information between the two agencies.
3) resolve any scheduling and coordination problems.
4) apprise the other agency of all project developments, through timely exchange of all appropriate correspondence and other new information, and through notification of all scheduled meetings which involve the applicant.
5) serve as a contact through whom all interagency communications can be directed and establish guidelines for direct staff contact where appropriate.

As the lead agency, the PSC determines the process, and is responsible, with input from the DNR, for developing the scope of the EIS or EA, directing document preparation activities, and public review of the EIS or EA.

The agencies shall jointly provide the applicant with an outline of the information to be included in a project application. The PSC shall not consider the application complete until it has been reviewed and determined to be sufficient by both agencies for development of the EIS or EA. Issues raised in scoping may supplement the agencies' initial content outline.

The scoping process to identify issues to be considered in the EIS or EA may include public meetings (held by the applicant, the agencies, or local municipalities) or solicitation of comments from the affected or interested public.

The preparation of the EIS or EA shall proceed according to applicable agency rules. Throughout the preparation of the document, each agency shall have final editorial authority over its portions of the documents, subject to lead agency non-substantive editorial and publication responsibilities.

Public notice of the availability of the EIS or EA shall be circulated as required by the applicable rules of the agencies. PSC will be the recipient of written comments, and will provide all comments to DNR in a timely manner. Responsibility for responding to public comments or addressing additional issues will be based on agency expertise and authority, as outlined in the next section of this Agreement.

PSC will conduct the public hearing on an EIS, generally as part of the CPCN hearing. During public hearings on the EIS, each agency shall make its staff available to answer questions from the public and interveners on those portions of the EIS for which it is responsible. DNR witnesses may testify on their role in preparing the

EIS, or present the positions of the agency. If feasible, any DNR permit hearings will be coordinated with the EIS/CPCN hearing.

Following completion of the hearings and response to public comments, each agency shall independently determine its compliance with WEPA. The final regulatory decisions of both agencies will be made independently upon completion of the hearing and review process.

IV. Responsibilities of each agency in preparing a joint EIS or EA

Each agency shall be responsible for verifying relevant materials supplied by the applicant, based on its expertise and legal responsibilities. If outside analysis of an application is needed, the agencies shall agree on the source of that expertise.

The PSC has principal responsibility for developing content related to the power system, social and economic issues, land use planning, transportation, human health and welfare (including electric and magnetic fields), the natural environment in general, and other elements that may be considered in its decisions or are subject to its authority. DNR is responsible for preparing, or ensuring the accuracy of, the portions of the document that describe activities it regulates (emissions, water source and discharge, stream crossings, effects on municipal wells, and solid waste disposal). DNR also will provide information and expertise as needed for the evaluation of impacts on terrestrial and aquatic life.

V. Resolution of Conflicts

Both agencies will attempt to resolve, informally and cooperatively, any disagreements or conflicts over procedures or information as described in this Agreement. If the responsible staff members are unable to resolve the issues, senior managers for each agency will attempt to resolve the disagreement. Should this fail, the agencies may consider issuance of separate environmental review documents.

_____ _____

Ave Bie, Chairperson Date
Public Service Commission

_____ _____

Darrell Bazzell, Secretary Date
Department of Natural Resources

ATTACHMENT 4: ELECTRIC GENERATION PROJECTS & ASSIGNMENTS as of 11/13/01

Project	Status	Location/Region	Project Manager	Regional Coordinator	Water Lead
BASELOAD/INTERMEDIATE PROJECTS					
Fox Energy	CPCN withdrawn – expect refiling by 12/01	Outagamie County/NER	To Be Determined (TBD)	TBD	TBD
Mirant Plover	DEIS issued 11/01	Portage Cty./WCR	TBD	TBD	TBD
Calpine Fond du Lac	CPCN filed 6/01	Fond du Lac Cty./NER	TBD	TBD	TBD
Skygen Rivergen	EP Reviewed 4/01	Rock Cnty/SCR	TBD	TBD	TBD
Rainy River	EP Filed 10/01	City of Superior/NOR	TBD	TBD	TBD
WEPCO Port Washington	EP Filed/Reviewed	City of Port Washington/SER	TBD	TBD	TBD
WEPCO Oak Creek SCPC	EP Filed 10/01	City of Oak Creek/SER	TBD	TBD	TBD
WEPCO Oak Creek IGCC	EP Filed 10/01	City of Oak Creek/SER	TBD	TBD	TBD
Walnut St. Cogen.		City of Madison/SCR	TBD	TBD	TBD
Calpine/Skygen Arpin	EP Review 8/01	Wood Cty. (Arpin)/WCR	TBD	TBD	TBD
WPSR Stoneman	EP Expected	Village of Cassville/SCR	TBD	TBD	TBD
PEAKING PLANTS					
Midwest Power	EP Review 9/01	New Berlin or Muskego/ SER	TBD	TBD	TBD
Midwest Power	EP Review 9/01	Rock Cnty. Beloit Twp/ SCR	TBD	TBD	TBD
Midwest Power	EP Review 9/01	Fond du Lac Cnty/Osceola Twp/NER	TBD	TBD	TBD
El Paso Energy	EP Expected	Muskego/SCR	TBD	TBD	TBD

Attachment 5

DRAFT
Concept Paper
"Proactive Strategy" Related to Power Plant Construction

Background

From the mid-1970's through 1997, the Advance Planning process was used to ensure electrical reliability in the state and to ensure a coordinated effort among the Public Service Commission (PSC), the Department (DNR), and the energy industry. The Advance Plan was designed to facilitate the consideration of major issues, such as the cost, reliability, efficiency, health, safety, and environmental effects of various alternatives for meeting the future electric energy needs of the state. The Advanced Plan set the framework for determining what facilities should and could be built in Wisconsin. With the addition of the coordinated site review process for specific facilities, PSC and DNR were engaged in a step by step process, with each responsible for certain actions before the permit process could proceed to the next step.

In 1998, the Legislature changed the siting and approval process for energy infrastructure. With passage of Act 204 (s. 196.491, Stats.), the Advance Planning process was discontinued, the ownership and construction of transmission components of the system were transferred to a separate company, and independent power producers were allowed to construct power plants in the state. Act 204 also truncated the step process that PSC and DNR had used to coordinate their actions regarding power plant review and permitting, with each now working off separate timelines prescribed in the statutes. These changes occurred against a backdrop of rapid change in the energy industry nationwide, characterized by deregulation, and a shift from retail to wholesale generation. Wisconsin has experienced these changes as well. As a net energy importer, Wisconsin is attracting non-utility energy producers (merchant power companies), who are interested in constructing power plants in our state. Many of these companies, and some of their consultants, are from out-of-state, and thus are unfamiliar with Wisconsin's regulatory framework. Energy technology is undergoing rapid change as well, resulting in new and complex issues that strain the existing regulatory and policy framework.

The challenge faced by the DNR is to maintain a robust and efficient permitting process that protects and enhances Wisconsin's environment and ecosystems while meeting the electrical energy needs of the state. This can be done by engaging the PSC and the electrical power industry in a process that moves the information-gathering needed to support the application and approval process "upstream," so that it can be accomplished at least in part before the clock starts ticking on the prescribed regulatory process. This proactive strategy could also result in a relationship among major players that promotes alignment of energy and ecosystem goals. All parties—PSC, DNR, and project applicants—are currently strained to complete their obligations in a satisfactory manner, thereby creating an opening for this new process.

Requirements of a Proactive Strategy

Although each of the major players will have particular needs that must be met by the strategy, it should be assumed that all parties will have in common a desire for sustainability—both of the environment and of energy production. This common desire should be acknowledged and put in place as the foundation for the rest of the strategy. In addition, a successful strategy should:

- Complement the "downstream" process
- Assure full compliance with all applicable laws and regulations
- Result in a net gain for key participants. Each of the major players must gain by becoming engaged in the process and staying engaged over time
- Address the bottlenecks and limiting factors in the regulatory phase of power plant siting (i.e., the post engineering plan phase)

- Be based on a business model rather than a regulatory model
- Be consultative and voluntary in nature, building on the strength of relationships
- Be realistic and "doable", for both implementing and maintaining the process over time
- Be written in plain language, opening up the process to citizens and others who are interested and concerned about power plant construction and Wisconsin's energy future
- Include industry consultants as well as industry representatives
- Take advantage of agency experience with successful "upstream" strategies
- Take advantage of web technology
- Be focused and directed toward a vision for Wisconsin's environment
- Empower all parties to achieve this vision through sharing of data, information, and expertise

A Proposal

The following proposal for an upstream strategy focuses primarily on power plant projects. It has four key parts:

1. Articulate the downstream process so that all parties will know what lies ahead. This could be done in various ways: (a) developing a road map for the permit process, that details, on a technology-specific basis, required permits and the process for obtaining them; (b) providing a list of companies that have been permitted and what their permits looked like; (c) providing a "model" permit application for each of the 3 types of power generation— simple cycle, combined cycle, and cogeneration. This information could be delivered through a web interface, by personal contact, or both. *The important thing will be for the information to be available from a single source, and be written from the applicant's perspective.* The source could be DNR's home page or the Wisconsin Government home portal. Formal agreements with other agencies (DOA, PSC, Commerce) involved in permit review and approval could be used to define a coordinated process for each agency's work.

2. Develop a Model Process that lays out what all companies should do upstream. This part of the strategy will identify traditionally "downstream" work that could be done by project applicants prior to submitting the Engineering Plan (the pre-application stage). Prime targets would be time-intensive studies or analyses that will help eliminate nonviable alternatives, such as sites with limiting factors such as air quality problems, and limited water supplies, or containing critical habitat for endangered species. The Model Process should also outline whom to contact within DNR and PSC, when contacts should be made, and the types of information that should be developed and shared with the agency ahead of the permit stage. The Model Process could also identify points of uncertainty in power plant design and construction, and separate them out for separate tracking.

3. Proactively contact potential companies and consulting firms that may be doing business in the state. Acquaint them with the state's regulatory framework and timelines, and invite them to work with DNR early in their project planning cycle, well ahead of the permit application phase. These contacts could be done through relationships with the Department of Commerce and the PSC, a regularly occurring energy summit focusing on natural resource issues, or through focused contacts with trade organizations or companies known to do business in the state. Focus should be on relationship building, information sharing, and technical assistance on the part of DNR. There should be overlap in the people involved in this upfront work and the people who will be involved in the downstream regulatory phase. These contacts will take time to initiate and maintain, and thus cannot be undertaken without adequate staffing allocated to this work. Potential limiting factors, such as handling of proprietary information, will need to be identified and successfully resolved.

4. Develop agreements covering sharing of data and protocols for considering and evaluating environmental and ecosystem impacts. These agreements will formalize the desire to cooperate on power plant siting and construction, will detail what data will be made available to PSC and energy companies, and how resulting analyses fit into the regulatory process. For example, an energy company or consulting firm might be licensed to use endangered resources and critical habitat data, but would follow a protocol that assured early and

effective coordination with key regulatory agencies. This same data could be shared with PSC so that they have the same information used by the DNR as each entity carries out its regulatory role. Such an agreement might be folded into a larger agreement with PSC on permit review process (see item #1 above).

Next Steps

Some of the steps outlined above may already be in place or in development. And there is a wealth of agency experience with pre-application consulting and business sector consulting that can be tapped. The next step should be to firm up the proactive strategy by assessing what is already in place and what needs to be done. Key tasks will be: (1) identify what processes are currently in place or in development to avoid duplication and confusion; (2) discuss the draft upstream strategy with key stakeholders, including other agencies, to gage their interest and see how it can be improved by including their ideas, (3) examine DNR's infrastructure and determine the best organizational platform to launch the proactive strategy, and (4) identify a management sponsor and a specific staff team or person to champion the strategy and guide it to implementation. An implementation plan will need to be developed that defines responsibilities among the various parties, estimates resources needed, and identifies actions to take on first. The proactive strategy and its implementation plan will need to be woven into other processes that the Department establishes to set work priorities.

Drafted by Betty Les, in consultation with Jeff Hanson, Duane Schuettpelz, John Shenot, Steve Ugoretz, and Jenny Bardeen, 10/29/01. Revised 11/03/01 following DNR Energy Work Group Discussion.

CORRESPONDENCE/MEMORANDUM

DATE: January 11, 2002

TO: Water Management Team

FROM: Susan Sylvester – AD/5

SUBJECT: Water Withdrawals and Water Loss Approvals for New Power Plants

The purpose of this memo is to create consistency and stability in guidance for the issuance of permits and approvals under s. 30.18 and s. 281.35, Stats., as these statutes apply to new power plants in the state. This guidance is needed primarily to clarify the process for decision-making by DNR staff on water withdrawals and losses. It supplements the guidance in my memo of November 30, 2001 dealing with permits and approvals for new power plants and is specific to the water withdrawal and water loss approval requirements of the aforementioned statutes.

In addition, this guidance will also help assure that we receive the right information from the project developers (or other parties, as necessary) and that the right people are making the decisions. This memo contains many different references to sections of the Statutes or Administrative Code and, therefore, you may need to have those references available to follow this guidance. To include excerpts from all those references would make this memo even more unwieldy and difficult to follow.

The statutes that apply to the diversion of water are complicated because of their inter-relationships and connections to one another. Additionally, the statutes are based upon some assumptions about how water use and conservation programs were to be implemented in the state. However, for a variety of reasons, not all of those actions have been implemented, and this has created processes for action that may seem less logical than the statutes may have originally envisioned. It is with this in mind that the following guidance is established to assure decisions relating to new power plants in the state employing a combined cycle system conform to the requirements of the statutes.

<u>Assumptions</u>

1. **All steam cycle power plants that (a) withdraw surface water and/or groundwater for use in the plant and discharge directly to surface water or groundwater or (b) obtain water from another wastewater source and discharge water that remains after power plant use to a surface water or groundwater will require some sort of plan review and approval under s. 281.41, Stats., for the wastewater discharges. This may be as simple as an oil/water separator, or it could be a more complicated water use and treatment system or plant.**

2. **Several of the steam cycle systems that are being proposed at this time are being designed as combined cycle systems and have a water consumption or loss rate of more than 2 million gallons per day. If the water consumption rate is greater than 5 million gallons per day and the facility is located in the Great Lakes basin, additional requirements under s. 281.35(5)(b), Stats., and NR 142.07, Wis. Adm. Code, will apply.**

3. **A permit under s. 30.18, Stats., is <u>not</u> needed for these facilities, because: a) the withdrawal or diversion is not associated with the control of water levels (s. 30.18(2)(a)1.); b) the withdrawal or**

diversion is not for purposes of agriculture or irrigation (s. 30.18(2)(a)2.); and c) there is, as noted above, an approval required under s. 281.41 (s. 30.18(2)(b)).

4. **Because a permit under s. 30.18, Stats. is not required, there is no specific provision under s. 281.35, to require the applicant to "…submit written statements of consent from all riparian owners…" (s. 30.18(3)(a)3.) as part of the application for a water loss approval. However, the Department must evaluate and determine, in general, that "…public rights… will not be adversely affected…" and "…will not have a significant detrimental effect on the quantity and quality of waters of the state." (s. 281.35(5)(d)1. & 6.)**

5. **The factors for issuance of a water loss approval under s. 281.35, Stats., for power plants that meet assumptions 1 and 2, are similar to the factors that the Department uses to issue permits under s. 30.18, Stats. The application, the decision process and the Department's determination must, however, be based on the requirements and conditions contained in s. 281.35, Stats., and NR 142, Wis. Adm. Code.**

6. **Although there are two procedural "approvals" required under ss. 283.35(5) and (6), it makes most sense that we make as many of the decisions called for under s. 283.35(6) prior to making the decision under subsection (5). Those subsection (6) decisions may either be built into the prior subsection's decision, or they could be made a clear part of the record so that everything in the decision under subsection (5) would track with what is anticipated under subsection (6).**

7. **The review and approval under s. 281.41, Stats., for a wastewater treatment system or plant does <u>not</u> have to occur simultaneously with the water loss approval under s. 281.35, Stats., nor is it necessary that the same person or persons within the Department evaluate and make the decisions and determinations on the applications or plans that are submitted under these two provisions.**

8. **The decision on the issuance of a water loss approval under s. 281.35, Stats., will generally be of greater significance to the overall design of the project than will the approval of plans for the wastewater system or plant under s. 281.41, Stats. It is important, therefore, that this decision be made as early as possible in the process of siting such a facility.**

<u>Decision Process</u>

1. **For all facilities meeting the assumptions above, the developer is notified of the need to obtain the s. 281.35, Stats. water loss approval and permit as part of the Department's response to the engineering plan submittal (see s. 196.491(3)(a)3.a., Stats.). The developer is instructed to provide the information specified in NR 142.06(2), Wis. Adm. Code, and is also provided reference to the basis of the Department's determinations as stated in NR 142.06(3), Wis. Adm. Code. In some instances that are likely to occur, public or private parties other than the power plant developer may be providing and/or discharging the water for the power plant and may be identified as the potential formal applicant for the water loss approval under the provisions of s. 281.35 (e.g., Heart of the Valley Metropolitan Sewerage District for Fox Energy). In this latter case, the basic decision process will not change, but there may be a need to identify the responsible parties and alter the communication linkages to assure that appropriate parties are involved in the process.**

2. **The Department's determination under NR 142.06(3) will be made as a GMU collaborative effort under the guidance and direction of the Regional water project manager for the specific facility. This project manager will identify DNR staff who are best able to review and make decisions regarding**

impacts on public or private water rights, impacts on the environment and ecosystem, impacts on the public interest and the other factors identified in NR 142.06(3), Wis. Adm. Code. Because this water loss review will be triggered by and relates to the provisions of the s. 281.41, Stats., plan approval, the Wastewater Permits and Pretreatment Section will provide assistance to the Regional project manager and staff to assure the water loss approval process is consistent with the approvals under the "normal" plan approval protocols. The water loss decision will normally occur earlier in the process than the wastewater system plan approval for the facility.

There may also be power plant proposals to withdraw groundwater and, as a result, require a high capacity well approval under s. 281.17, Stats. In these instances, the water loss approval will always occur in conjunction with or, more likely, prior to the approval for that high capacity well, rather than connecting to the plan approval for the wastewater system or plant under s. 281.41. The approval of a high capacity well must "…ensure…that the well meets the grounds for approval under s. 281.35, if applicable." (s. 281.17(1)(b), Stats.) To assure the approval process is consistent with the approvals and permits under the "normal" approval and permitting protocols, the Regional water project manager should consult with the program staff in the Bureau of Drinking and Groundwater and the Bureau of Watershed Management to establish a case-specific determination of the process for reviewing the water loss application.

The decision on the water loss must be consistent with the information contained in the Environmental Assessment or Environmental Impact Statement prepared for the project. (Note: The EA or EIS will normally be prepared jointly by the Department and the Public Service Commission of Wisconsin.) Furthermore, the final decision on water loss cannot occur prior to completion of the WEPA process.

3. **Plans under s. 281.41, Stats., for the wastewater treatment and disposal system may be submitted at any time, but at least 90 days prior to the beginning of construction of those treatment facilities (see NR 108.03, Wis. Adm. Code). These plans will be reviewed by the Wastewater Permits and Pretreatment Section in the Bureau of Watershed Management. This approval may occur at any time during the planning for the project, but does not have to occur simultaneously with the approval for the water loss.**

4. **Water project managers for projects that propose to have a water loss greater than 5 million gallons per day in the Great Lakes Basin must contact the Great Lakes and Watershed Planning Section for assistance in facilitating the review process under s. 281.35(5)(b), Stats.**

If you have any questions about this guidance please contact Duane Schuettpelz (266-0156).

cc: Duane Schuettpelz – WT/2
Lee Boushon – DG/2
Mark Putra – DG/2
Mary Ellen Vollbrecht – FH/3
Chuck Ledin – WT/2
Linda Talbot – WT/2
Chuck Hammers – LS/5
Terry Lohr – WT/2
Dale Simon – FH/3
Elizabeth Bier – WT/2
Energy Workgroup

CORRESPONDENCE/MEMORANDUM

DATE: February 26, 2003

Insert: CHAPTER 10
Waterway and Wetland Handbook

TO: Water Management Specialists
Water Management Engineers
Regional Aquatic Habitat Experts
Bureau of Fisheries Management and Habitat
Protection – Rivers and Habitat Protection Section
Basin Leaders
Water Leaders

SUBJECT: **Guidance on Processing Requests for Expedited Permit Reviews**

This document is intended solely as guidance, and does not contain any mandatory requirements except where requirements found in statute or administrative rule apply. This guidance does not establish or affect legal rights or obligations, and is not finally determinative of any of the issues addressed. This guidance cannot be relied upon and does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decision made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.

Summary of Guidance

Expedited review of a waterway or wetland application is available to applicants with payment of a supplemental permit fee. This guidance outlines the legal requirements and sets forth the internal procedures, roles and responsibilities for responding to requests to expedite an application review.

Background

The expedited decision option and supplemental fees are authorized in sections 30.28, 31.39 and 281.22, Wisconsin Statutes. NR 300, Wisconsin Administrative Code sets the procedures, fees and time limits for obtaining and making expedited decisions. NR 305, Adm. Code identifies time limits for decisions on applications for water regulatory permits or approvals under Chapters 30 and 31, Stats. Expediting guarantees a decision date sooner than the maximum time periods set by rule. If the Department does not issue a decision by the guaranteed decision date, the supplemental fee is refunded.

Note: projects which are exempt under 30.28(3), 31.39(3) and 281.22(3) are not eligible for expedited application review. This includes: chapter 30 projects funded in whole or in part by any federal or state agency; permits issued under 30.12(3)(a) 2., 2m or 3; chapter 31 projects proposed by any federal or state agency; and water quality certification projects proposed by any federal or state agency.

General Policy

The Department will generally accept all requests for expedited application review for which the supplemental fee is collected. Expedited applications are part of our regular workload, and will take priority. As needed and when funding is available, staff may be assigned to work for overtime pay or compensatory time, but staff will also work on expedited applications during regular hours. In order to minimize impacts on regular applicants and to meet guaranteed deadlines, supervisors should assign overtime or compensatory time in accordance with MC 9133 and existing Secretary's approvals.

Applicants for expedited reviews should be encouraged to contact Department staff about their project well in advance of submitting an application, to determine what permits may be needed and ensure that they gather all necessary information to submit a complete application.

Procedure

The following table outlines the standard operating procedures that should be followed in each region for processing a request for an expedited application review:

Water Leader	Ensure that a regional system exists for monitoring of incoming applications for expedited requests, and assignment to WMS for preliminary review within one day of application receipt.
Applicant	Request expedited review of a new permit application, submit supplemental fee, and specify the desired decision date.
WMS	*Within 20 days of application receipt:* Notify Supervisor and Aquatic Habitat Expert (AHE) of request, review application for completeness, remit fee and determine the guaranteed decision date (see paragraph following table). • If application is complete, check availability of engineer, fisheries or wildlife biologist or other staff needed to assist in permit review, and determine time frame. Notify applicant in writing of the guaranteed decision date (applicant's proposal or alternative date). • If application is sufficient to commit to an expedited review but is not complete, notify applicant in writing that the project will be accepted into the expedited track. Identify the information needed to complete the application, and indicate that a guaranteed decision date will be provided once the application is complete. • If application is so incomplete that you cannot determine jurisdiction or otherwise commit to a guaranteed decision date, notify the applicant in writing. Identify the information needed to complete the application and indicate that once the application is complete, the Department will respond promptly as to whether the project will be accepted into the expedited track, and if so, the guaranteed decision date. • For any of the above, if WMS or other needed staff are unable to commit to an expedited review, or if weather conditions prevent jurisdictional confirmation and/or public interest review, consult supervisor and AHE.
Supervisor, AHE and Water Leader	*Within 20 days of application receipt:* When WMS or other essential staff are unable to commit to an expedited review, seek assistance from staff in other basins, adjacent regions, and central office in that order. When staff are not available to work overtime or for compensatory time, identify where work on expedited applications may be done during regular hours to the extent necessary to allow acceptance of new request into expedited track. Determine if weather conditions occur that may delay application review. When extreme circumstances exist that may warrant denial of expedited request, consult with FH Bureau (see paragraph below table). Regional Water Leader will make decision to deny.

WMS	*Within 20 days of application receipt:* Notify permit applicant in writing that request for expedited review is denied, or that the department is unable to commit to a guaranteed decision date due to weather or other circumstances (see NR300.05) and when we expect to be able to commit (if possible).
WMS	Contact applicant to determine their desire to either continue with expedited processing, or withdraw request for expedited processing based. If expedited processing is confirmed, alert affected staff and continue expedited review. If request for expedited processing is withdrawn, refund supplemental fee and process as a regular application.
WMS	*During expedited review, c*ontact applicant if at any time during an expedited review, unanticipated conditions (see NR300.05) will delay a decision.

Several steps above identify notifying the applicant in writing, to ensure that the applicant is clear about our decision-making process. Where it is helpful to increase efficiency and customer service, communicating these decision points may be made by telephone, and written correspondence consolidated (e.g. one letter to accept into expedited track and send out public notice).

Determining the Guaranteed Decision Date

We should evaluate each application and consider a number a factors in determining what guaranteed decision date we are able to offer. Take into account factors such as:

- Statutory and code deadlines
- Workload and availability of staff needed for the review
- Work that you and other reviewers will have to do – e.g. complex cases or atypical issues may require more time
- Necessary steps in the permit process (e.g. 30-day public notice)
- Weather conditions that affect ability to make jurisdictional determination or site inspection
- The applicant's requested decision date

If we cannot meet the applicant's requested decision date, but can offer an alternative expedited decision date, communicate the alternative date and the reasons clearly to the applicant.

In letters committing to expedited review, include conditions for exceptions to the guaranteed date for factors as specified in NR300.05 that are beyond the Department's control.

Denying Expedited Requests

All efforts should be made to accept requests for expedited permit review, but there may be extreme circumstances that necessitate a request being denied. The primary example would be where staff vacancies and/or volume of pending permit requests make it impossible to accept a new expedited permit request without causing us to exceed statutory deadlines in processing (and potentially refund fees for) more than four regular permit applications. Expedited requests for projects where no fee is required are not eligible for expedited review by statute.

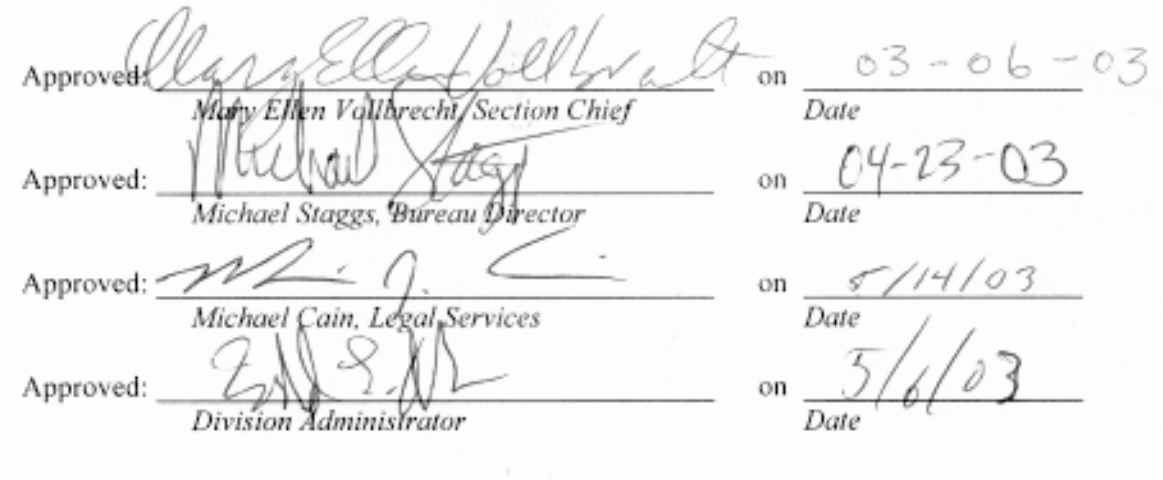
Each decision to deny a request for expedited permit review must be made by the Regional Water Leader after completion of all steps in the table above. Consultation with the FH Bureau is to provide technical assistance to the region, and provide notification to the Bureau that a denial is being considered. The Regional Water Leader then directs the WMS, AHE or Supervisor to notify the applicant that the request is denied, by a letter sent within 20 days of application receipt.

Regional Flexibility

While the table and guidance above establish the statewide procedure for handling expedited permit requests, certain issues and details are best handled through a local procedure. For example, a region may designate one WMS to be the primary contact for all expedited requests, or a region may have a policy that each WMS handle the expedited requests in their assigned counties. Similarly, a region or basin may choose to have a certain WMS handle expedited requests from a particular permit applicant (e.g. MMSD) based on established working relationships, long-term involvement in project planning, specialized technical knowledge, or specialized familiarity with a particular resource. Once an expedited permit is issued, the region may choose how to handle compliance inspections and permit follow-up – e.g. these responsibilities may remain with the permit writer, or the permit file and follow-up responsibilities may be transferred to the county WMS (if different).

Drafted by Liesa Nesta

Approved by Aquatic Habitat Coordinators – August 16, 2002



CORRESPONDENCE/MEMORANDUM

DATE: May 14, 2004

Insert: CHAPTER 10
Waterway and Wetland Handbook

TO: Water Management Specialists
Water Management Engineers
Regional Aquatic Habitat Experts
Bureau of Fisheries Management and Habitat
Protection – Rivers and Habitat Protection Section

SUBJECT: Guidance for the Establishment of Protective Areas for Wetlands in Runoff Management Rules, Wisconsin Administrative Code NR 151

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Summary of Guidance

NR 151.12(5)(d) Protective areas.

Chapter NR 151, Wis. Adm. Code, establishes runoff pollution performance standards for non-agricultural facilities and transportation facilities and performance standards and prohibitions for agricultural facilities and practices designed to achieve water quality standards.

Protective areas are established to minimize impacts from runoff coming from developed areas before it reaches sensitive resources. The protective area begins at the delineated boundary of the wetland. The width of the protective area is measured horizontally from the nearest edge of the wetland to the nearest edge of an impervious surface. Special restrictions exist in protective areas to allow them to filter runoff and reduce the potential for adverse impacts to wetlands. For wetlands, the size of the protective area is based upon the location, type and condition of the wetland. There are three protective area categories:

Category 1: 75 feet
A protective area width of 75 feet is established for wetlands in areas of special natural resource interest, as defined in NR 151.12 (5)(d)1.a, Adm. Code. Wetlands in areas of special natural resource interest include wetlands both within boundaries of designated areas of special natural resource interest and those wetlands that are in proximity to or have a direct hydrologic connection to such designated areas. Wetlands that have a groundwater or surface water connection to an area of special natural resource interest are treated as Category 1 wetlands. The

following are the designated areas of special natural resource interest in NR 103.04:

(1) Cold water communities as defined in s. NR 102.04(3)(b), including all trout streams and their tributaries and trout lakes;

(2) Lakes Michigan and Superior and the Mississippi river;

(3) State and federal designated wild and scenic rivers, designated state riverways and state designated scenic urban waterways, s. 30.26, Stats., ch. NR 302, 16 USC 1271 to 1287, ss. 30.40 to 30.49, Stats., and s. 30.275, Stats.;

(4) Unique and significant wetlands identified in special area management plans (SAMP), special wetland inventory studies (SWIS), advanced delineation and identification studies (ADID) and areas designated by the United States environmental protection agency under s. 404(c), 33 USC 1344 (c);

(5) Calcareous fens;

(6) Habitat used by state or federally designated threatened or endangered species, s. 29.604, Stats., ch. NR 27 and 16 USC 1531 to 1543;

(7) State parks, forests, trails and recreation areas;

(8) State and federal fish and wildlife refuges and fish and wildlife management areas;

(9) State and federal designated wilderness areas (16 USC 1131 to 1135 and s. NR 1.415);

(10) Designated or dedicated state natural areas established under ss. 23.27 to 23.29, Stats.;

(11) Wild rice waters; and

(12) Any other surface waters identified as outstanding or exceptional resource waters in ch. NR 102.

Category 2: 50 feet

Category 2 includes wetlands that are called “highly susceptible wetlands”, which require a protective area width of 50 feet pursuant to s. NR 151.12(5)(d)1.d., Adm. Code. Highly susceptible wetlands include the following wetland plant community types: fens, sedge meadows, bogs, low prairies, fresh wet meadows, shallow marshes, deep marshes, seasonally flooded basins, conifer swamps, shrub swamps and other forested wetlands. This category includes most of the wetland types found in Wisconsin. A special rare wetland type, calcareous fens, is included in Category 1 as a wetland in an area of special natural resource interest.

Category 3: 10% of the Average Wetland Width – 10 to 30 feet

This category is designated for wetlands considered "less susceptible" that require a protective area width of 10% of the average wetland width, but not less than 10 feet nor more than 30 feet pursuant to s. NR 151.12(5)(d)1.e., Adm. Code. These wetlands include significantly degraded wetlands that are dominated by invasive species such as reed canary grass (*Phalaris arundinacea*). Although NR 151 lists only reed canary grass, other invasive species may significantly degrade wetlands. Purple loosestrife (*Lythrum salicaria*) and non-native strains of common reed grass (*Phragmites australis*) are also common, widespread invasive plant species found in wetlands. To be considered dominated by invasive species means the wetland contains over 90% of the species as measured by percent vegetative cover.

Average Wetland Width

The following procedure is recommended for calculating the average width of a wetland:

Step 1. Draw a centerline that runs across the long axis of the wetland. This is not necessarily a straight line but one where half of the wetland area is located on each side of the centerline.

Step 2. Make at least 5 individual measurements across the wetland that are perpendicular to the centerline established under step 1. Enough measurements shall be taken to establish a representative average wetland width. These measurements shall be made equidistant apart along the centerline established under step 1. If the wetland has a configuration with a relatively long narrow strip that is connected to a much broader area, then the wetland area calculation may be broken up into separate areas with the average wetland width established for each separate area.

Step 3. The wetland's average width shall be the arithmetic average of the individual measurements taken under step 2.

Attachment 1 is an example calculation titled *Calculating Wetland Width*.

Determining the Wetland Category

Category 1 wetlands are generally determined by their location in or adjacent to special designated areas. For instance, a wetland hydrologically connected to a trout stream or adjacent to Lake Michigan is a Category 1 wetland. A locational exception is calcareous fens, a type of wetland plant community found in areas of upwelling, mineral-rich water. These wetlands are rare and can be identified by the vegetative species found growing in them. Examples of common plants that occupy calcareous fens include shrubby cinquefoil (*Pentaphylloides floribunda*), wild timothy (*Muhlenbergia glomerata*), Ohio goldenrod (*Solidago ohioensis*) and lesser fringed gentian (*Gentianopsis procera*).

Most wetlands will fall into Category 2. Wetland community types can be determined by using Attachment 2, *Key to the Wetland Plant Communities*, from Eggers and Reed, 1997. Guides such as *Wetland Plants and Plant Communities of Minnesota & Wisconsin*, US Army Corps of Engineers, 1997, further describe wetland plant communities and typical plants found within those communities and are helpful in classifying wetland types.

In some cases, heavily disturbed wetlands are totally dominated by invasive plant species. These wetlands generally fall into Category 3. However, care must be taken to avoid adversely impacting small, intact wetland plant communities within an otherwise monotypic invasive plant community. In wetlands where intact native communities are located within a monotypic stand of invasive plants, the higher designation should be applied. The width of the protective area should be measured from the edge of the wetland.

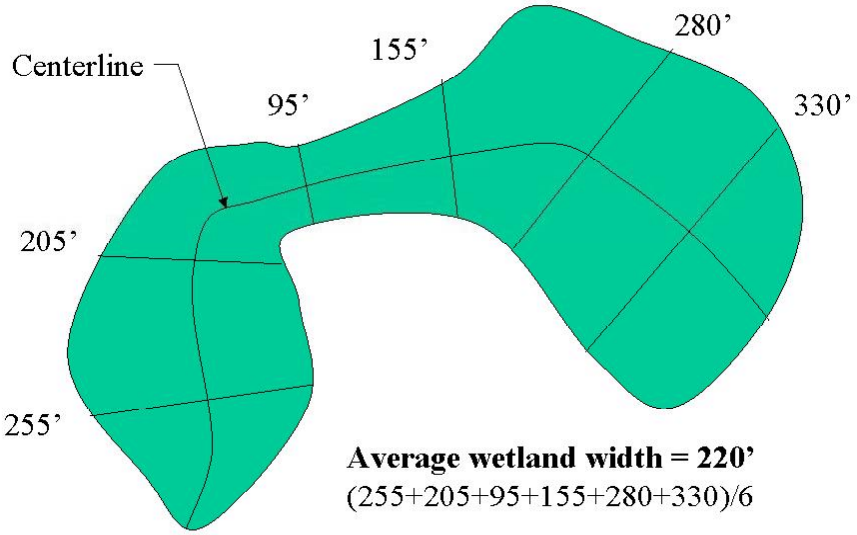
Also, some wetland plant communities may be altered by human modifications to change the character of the wetland. This is most commonly encountered in agricultural areas where drier wetlands are farmed. During certain times of the year, a wetland may be unvegetated or it may support non-wetland species, such as corn or soybeans. These areas are still considered wetlands if they are capable of supporting wetlands species in the absence of the human modification, such as the cessation of farming. The wetland should be classified on the basis of the plant community that would normally be supported in the absence of the disturbance. This can be determined using the disturbed area procedures in the 1987 US Army Corps of Engineers Wetland Delineation Manual.

Wetland Boundary Delineation

The 1987 Corps of Engineers Delineation Manual and subsequent guidance documents establish the standard and accepted techniques for identifying and delineating wetlands in Wisconsin. The Army Corps of Engineers Regulatory IV training manual contains all of the applicable guidance documents and training materials for making a determination. While many wetland determinations are clear and boundaries abrupt, disturbed or problem areas are common. Examples of these areas include farmed wetlands, seasonal wetlands (wetlands that do not have obvious wetland hydrology) and areas of sandy or lacustrine clay soils. It is advisable for qualified individuals with Regulatory IV training to make determinations in these difficult areas.

Attachment 1

Calculating Wetland Width



Average wetland width = 220'
(255+205+95+155+280+330)/6

Protective width = 10% x 220' = 22'

Attachment 2
Key to the Wetland Plant Communities

1A. Mature trees (diameter breast height [dbh] of 6 inches or more) are present and form closed stands (more than 17 trees per acre; more than a 50 percent canopy cover) on wet, lowland soils (usually floodplains and ancient lake basins).

2A. Hardwood trees are dominant; usually alluvial, peaty/mucky, or poorly drained mineral soils.

3A. Silver maple, American elm, river birch, green ash, black willow and/or eastern cottonwood are dominant; growing on alluvial soils associated with riverine systems……..……..**FLOODPLAIN FOREST**

3B. Black ash, yellow birch, silver maple and/or red maple are dominant; northern white cedar may be subdominant; growing on poorly drained mineral or peat/muck soils, often associated with ancient lake basins.
……..…**HARDWOOD SWAMP**

2B. Coniferous trees are dominant; soils usually peaty.

4A. Tamarack and/or black spruce are dominant; growing on a continuous sphagnum moss mat and acid, peat soils……...**CONIFEROUS BOG**

4B. Northern white cedar and/or tamarack are dominant; continuous sphagnum moss mat absent; usually growing on neutral to alkaline peat/muck soils.
……**CONIFEROUS SWAMP**

1B. Mature trees are absent or, if present, form open, sparse stands; other woody plants, if present, are shrubs or saplings and pole-size trees (dbh less than 6 inches) less than 20 feet high and growing on wet, lowland or poorly drained soils, or in groundwater seepage areas.

5A. Community dominated by woody shrubs.

6A. Low, woody shrubs usually less than 3 feet high; sphagnum moss mat layer may or may not be present.

7A. Shrubs are ericaceous and evergreen growing on a sphagnum moss mat layer; peat soils are acidic…….……...……..**OPEN BOG**

7B. Shrubs are deciduous, mostly shrubby cinquefoil, often growing on sloping sites with a spring-fed supply of internally flowing, calcareous waters; other calciphiles are also dominant; sphagnum moss mat layer absent; much/poorly drained mineral soils are alkaline…….……**CALCAREOUS FEN**

6B. Tall, woody deciduous shrubs usually greater than 3 feet high; sphagnum moss mat

layer absent……..…….....**SHRUB SWAMPS**

8A. Speckled alder is dominant; usually on acidic soils in and north of the vegetation tension zone…….……..…….**ALDER THICKET**

8B. Willows, red-osier dogwood, silky dogwood, meadowsweet and/or steeplebush are dominant on neutral to alkaline poorly drained muck/mineral soils; found north and south of the vegetation tension zone……...**SHRUB-CARR**[1]

5B. Community dominated by herbaceous plants.

9A. Essentially closed communities, usually with more than 50 percent cover.

10A. Sphagnum moss mat on acid peat soils; leatherleaf, pitcher plants, certain sedges and other herbaceous species tolerant of low nutrient conditions may be present.…….……..…**OPEN BOG**

10B. Sphagnum moss mat absent; dominant vegetation consists of sedges (Cyperaceae), grasses (Poaceae), cattails, giant bur-reed, arrowheads forbs and/or calciphiles. Soils are usually neutral to alkaline poorly drained mineral soils and mucks.

11A. Over 50 percent of the cover dominance contributed by the sedge family, cattails, giant bur-reed, arrowheads, wild rice and/or giant reed grass (*Phragmites*).

12A. Herbaceous emergent plants growing on saturated soils to areas covered by standing water up to 6 inches in depth throughout most of the growing season.

13A. Major cover dominance by the sedges (primarily genus *Carex*).……..….**SEDGE MEADOW**

13B. Major cover dominance by cattails, bulrushes, water plantain, *Phragmites*, arrowheads and/or lake sedges.
……..…….**SHALLOW MARSH**

12B. Herbaceous submergent, floating and emergent plants growing in areas covered by standing water greater than 6 inches in depth throughout most of the growing season……..……....**DEEP MARSH**

[1]Buckthorns (*Rhamnus* spp.) may occur as dominant shrubs or small trees in disturbed shrub-carrs

11B. Over 50 percent of the cover dominance contributed by grasses (except wild rice and *Phragmites*), forbs and/or calciphiles.

14A. Spring-fed supply of internally flowing, calcareous waters, often sloping sites; calciphiles such as sterile sedge, wild timothy, Grass-of-Parnassus and lesser fringed gentian are dominant……..……..**CALCAREOUS FEN**

14B. Water source(s) variable; calciphiles not dominant.

15A. Soils saturated to inundated during the growing season; prairie grasses such as big bluestem, prairie cordgrass and/or Canada bluejoint grass are usually dominant, and various species of lowland prairie forbs are present.
……..…**WET TO WET-MESIC PRAIRIE**

15B. Site rarely inundated, but soils are saturated for all or part of the growing season; dominated by forbs such as giant goldenrod and/or grasses such as redtop and reed canary grass.
……..……..…….**FRESH (WET) MEADOW**

9B. Essentially open communities; either flats or basins usually with less than 50 percent vegetative cover during the early portion of the growing season, or shallow open water with submergent, floating and/or floating-leaved aquatic vegetation.

16A. Areas of shallow, open water (to 6.6 feet in depth) dominated by submergent, floating and/or floating-leaved aquatic vegetation.
……..…….**SHALLOW, OPEN WATER COMMUNITIES**

16B. Shallow depressions or flats; standing water may be present for a few weeks each year but are dry for much of the growing season; often cultivated or dominated by annuals such as smartweeds and wild millet.
……..**SEASONALLY FLOODED BASIN**

Drafted by Patricia Ann Trochlell

Approved: _____ on 5/28/2004
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Approved: _____ on 5/28/2004
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Approved: _____ on 11/12/04 (rec'd 11/10/04)
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